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**DEPARTMENT OF JUSTICE**

**28 CFR Part 0**

**Executive Office for Immigration Review**

**8 CFR Parts 1001, 1003, and 1292**

**[EOIR Docket No. 18-0502; A.G. Order No. 4874-2020]**

**RIN 1125-AA85**

**Organization of the Executive Office for Immigration Review**

**AGENCY:** Executive Office for Immigration Review, Department of Justice.

**ACTION:** Final rule.

**SUMMARY:** On August 26, 2019, the Department of Justice (“Department”) published an interim final rule (“IFR”) amending the regulations related to the internal organization of the Executive Office for Immigration Review (“EOIR”). The amendments reflected changes related to the establishment of EOIR’s Office of Policy (“OP”) in 2017, made related clarifications or changes to the organizational role of EOIR’s Office of the General Counsel (“OGC”) and Office of Legal Access Programs (“OLAP”), updated the Department’s organizational regulations to align them with EOIR’s regulations, made nomenclature changes to the titles of the members of the Board of Immigration Appeals (“BIA” or “Board”), provided for a delegation of authority from the Attorney General to the EOIR Director (“Director”) related to the efficient disposition of appeals, and clarified the Director’s authority to adjudicate cases following changes to EOIR’s Recognition and Accreditation Program (“R&A Program”) in 2017. This final rule responds to comments received and adopts the provisions of the IFR with some additional amendments: restricting the authority of the Director regarding the further delegation of certain regulatory

authorities, clarifying that the Director interprets relevant regulatory provisions when adjudicating recognition and accreditation (“R&A”) cases, and reiterating the independent judgment and discretion by which the Director will consider cases subject to his adjudication.

**DATES:** This rule is effective on [INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER].

**FOR FURTHER INFORMATION CONTACT:** Lauren Alder Reid, Assistant Director, Office of Policy, Executive Office for Immigration Review, 5107 Leesburg Pike, Suite 2616, Falls Church, VA 22041, telephone (703) 305–0289 (not a toll-free call).

**SUPPLEMENTARY INFORMATION:**

**I. Interim Final Rule: Summary and Authority**

On August 26, 2019, the Department published an IFR amending the regulations related to the internal organization of EOIR. *See* Organization of the Executive Office for Immigration Review, 84 FR 44537 (Aug. 26, 2019).

A. Summary of Regulatory Changes

The IFR revised §§ 1001.1, 1003.0, 1003.1, 1003.108, 1292.6, 1292.11, 1292.12, 1292.13, 1292.14, 1292.15, 1292.16, 1292.17, 1292.18, 1292.19, and 1292.20 in title 8 of the Code of Federal Regulations (“CFR”), and §§ 0.115, 0.116, 0.117, and 0.118 in title 28 of the CFR.

1. *Office of Policy*

First, the IFR amended titles 8 and 28 of the CFR to reflect the establishment of EOIR’s OP, which was created in 2017 to issue operational instructions and policy, administratively coordinate with other agencies, and provide for training to promote quality and consistency in adjudications. 84 FR at 44538. Prior to the IFR, EOIR’s regulations outlined the functions of

the majority of other EOIR components but did not include OP. The IFR added a new paragraph (e) to 8 CFR 1003.0 that provides the authority and responsibilities of OP. 84 FR at 44538, 44541; *see* 8 CFR 1003.0(e).

As part of the codification of OP in EOIR's regulations, the IFR also delineated OGC's authority regarding numerous EOIR programs and transferred some of OGC's programs to OP to ensure sufficient resources and to more appropriately align certain programs with their policymaking character. 84 FR at 44538–39; *see* 8 CFR 1003.0(e), (f).

## *2. Office of Legal Access Programs*

To ensure proper functioning and support of EOIR's programs, the IFR transferred OLAP's responsibilities from the Office of the Director ("OOD") to a division in OP. 84 FR at 44539. The Department determined that OLAP more appropriately belongs in OP, which has improved abilities to facilitate and coordinate OLAP's work across adjudicatory components in EOIR. *Id.* Accordingly, the IFR removed and reserved paragraphs (x) and (y) in 8 CFR 1001.1, which provided definitions for OLAP and the OLAP Director. 84 FR at 44541. The IFR also revised 8 CFR 1003.108 and 8 CFR part 1292 by replacing the phrases "OLAP" and "OLAP Director" with "Office of Policy" and "Assistant Director for Policy (or the Assistant Director for Policy's delegate)," respectively. 84 FR at 44542.

## *3. The Department's Regulations*

The IFR sought to resolve inconsistencies between title 8 and title 28, CFR, regarding EOIR's organizational structure. 84 FR at 44537–38, 44539. The Department's general organizational regulations are located in 28 CFR part 0, subpart U. EOIR's current organizational structure is outlined in 8 CFR part 1003. Over time, these two titles were not updated consistently, such that 28 CFR part 0 was generally outdated. The IFR aligned these

two titles, updated regulatory citations, and provided for the possibility for updates to title 8, thereby reducing the likelihood for future inconsistencies. 84 FR at 44539; *see generally* 8 CFR pt. 1003; 28 CFR pt. 0, subpt. U.

#### *4. Board of Immigration Appeals*

The IFR offered an alternate title for members of the BIA—in addition to being referred to as “Board members,” persons occupying those positions may also be referred to as “Appellate Immigration Judges” to better reflect the nature of their responsibilities. 84 FR at 44539; *see* 8 CFR 1003.1(a)(1). The Department believes the alternate title reflects the adjudicatory responsibilities those positions have for cases that the Attorney General designates to come before them. *See* 84 FR at 44539; *see also* Authorities Delegated to the Director of the Executive Office for Immigration Review, the Chairman of the Board of Immigration Appeals, and the Chief Immigration Judge, 65 FR 81434, 81434 (Dec. 26, 2000) (acknowledging that the substantive and practical functions exercised by Board members are aptly described by the title “Appellate Immigration Judge”). Relatedly, the IFR clarified in 8 CFR 1003.1(a)(2) and (4) that the Chairman of the BIA should also be known as the Chief Appellate Immigration Judge, a Vice Chairman of the BIA should also be known as a Deputy Chief Appellate Immigration Judge, and temporary Board members should also be known as temporary Appellate Immigration Judges. 84 FR at 44542; *see* 8 CFR 1003.1(a)(2), (4).

To provide more practical flexibility and efficiency in deciding appeals, the IFR delegated authority from the Attorney General to the Director to review certain cases from the BIA that have not been timely resolved. 84 FR at 44539–40; *see* 8 CFR 1003.1(e)(8)(ii). Specifically, the IFR amended 8 CFR 1003.1(e)(8)(ii) to provide that the Chairman shall either assign to himself or a Vice Chairman for final decision within 14 days any appeals that are not

completed within the designated timelines, or he may refer such appeals to the Director (previously, the Attorney General) for decisions. 84 FR 44539–40. The Attorney General is delegating this authority to the Director because the Director is better situated, as the immediate supervisor of the BIA Chairman and the person in more direct, regular contact with the Chairman regarding pending cases, to ensure timely adjudication of these cases. *Id.* The Attorney General’s delegation is necessary given the other obligations on the Attorney General’s schedule and because the Director is better situated to ensure that procedures or changes are implemented so that untimely adjudications are rare. *See id.*

#### 5. *Other Authorities of the EOIR Director*

The IFR sought to resolve tension between 8 CFR 1003.0(c), limiting the Director’s authority to adjudicate or direct the adjudication of cases, and 8 CFR 1292.18, regarding the Director’s authority to adjudicate requests for review of R&A Program determinations. 84 FR at 44540. When the Director was given authority under 8 CFR 1292.18, the limiting regulations at 8 CFR 1003.0(c) were not updated to reflect the change. *See* 84 FR at 44540; *see generally* Recognition of Organizations and Accreditation of Non-Attorney Representatives, 81 FR 92346 (Dec. 19, 2016). The IFR resolved this tension by updating 8 CFR 1003.0(c) to clarify that the limitation on adjudicatory authority is “[e]xcept as provided by statute, regulation, or delegation of authority from the Attorney General, or when acting as a designee of the Attorney General.” 8 CFR 1003.0(c).

#### B. Legal Authority for the Interim Final Rule

The Department issued the IFR pursuant to its authority under several statutory provisions. Generally, 5 U.S.C. 301 provides authority to department heads to issue regulations regarding, among other things, the governance of the department, employee conduct, and the

distribution and performance of its business. More specifically, section 103(g) of the Immigration and Nationality Act (“INA” or “the Act”) (8 U.S.C. 1103(g)), provides authority to the Attorney General to establish regulations and to “issue such instructions, review such administrative determinations in immigration proceedings, delegate such authority, and perform such other acts as the Attorney General determines to be necessary for carrying out [INA 103 (8 U.S.C. 1103)],” which includes the immigration functions of EOIR.

The Homeland Security Act of 2002 (“HSA”), which added section 103(g) to the INA, further affirms the authority of the Attorney General over EOIR. *See* HSA, Pub. L. 107-296, tit. XI, secs. 1101, 1102, 116 Stat. 2135, 2273–74. Section 1101(a) of the HSA (6 U.S.C. 521(a)) states that “the Executive Office for Immigration Review . . . shall be subject to the direction and regulation of the Attorney General under [INA 103(g)].”

Pursuant to this overarching regulatory authority, the Attorney General may amend the Department’s regulations as necessary. In accordance with these authorities, the Attorney General promulgated the changes in the IFR.

## **II. Public Comments on the Interim Final Rule**

### **A. Summary of Public Comments**

The comment period associated with the IFR closed on October 25, 2019, with 193 comments received on the IFR.<sup>1</sup> Individual or anonymous commenters submitted 118 comments, and organizations, including non-government organizations, legal advocacy groups, non-profit organizations, and religious organizations, submitted 75 comments. A majority of

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<sup>1</sup> The Department reviewed all 193 comments submitted in response to the rule; however, the Department did not post five of the comments to <https://www.regulations.gov> for public inspection. Of these comments, four were duplicates of another comment submitted by the same commenter, and one, which asked a specific visa-related question and provided a copy of a personal passport page, was unrelated to the IFR. Accordingly, the Department posted 188 comments.

individual commenters opposed the rule, while two supported the rule. All organizations expressed opposition to the rule.

Many, if not most, comments opposing the IFR either misstate its contents, proceed from an erroneous legal or factual premise, or contain internal logical inconsistencies. As the vast majority of comments in opposition fall within one of these three categories, the Department offers the following general responses to them, supplemented by more detailed, comment-specific responses in Part II.C of this preamble.

Several comments misstate the contents of the IFR. For example, many comments oppose the IFR because it allegedly eliminates OLAP, the Legal Orientation Program (“LOP”), and the Legal Orientation Program for Custodians of Unaccompanied Alien Children (“LOPC”), or changes the R&A Program.<sup>2</sup> However, the IFR makes clear that it does neither. *See* 84 FR at 44539 (“This rule is not intended to change—and does not have the effect of changing—any of OLAP’s current functions.”); 8 CFR 1003.0(e)(3) (maintaining the R&A Program).

Several comments object to the idea that the IFR allows the Director to refer himself any case for review from the BIA at any time and under any circumstance. However, the IFR makes clear that cases would only be referred to the Director after the existing and longstanding regulatory deadline for adjudication by the Board has passed, which necessarily occurs only after briefing has been completed, the record is complete, and the case is ripe for decision. 84 FR at 44539–40 (“Accordingly, this rule delegates authority from the Attorney General to the Director to adjudicate BIA cases that *have otherwise not been adjudicated in a timely manner under the*

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<sup>2</sup> “LOP” is often used as an umbrella term to describe all of the legal access programs administered by OP: the general LOP, the LOPC, the LOPC National Call Center, the Immigration Court Help Desk, and the National Qualified Representatives Program. Unless otherwise indicated, all references to “LOP” herein refer to only the general LOP.

*regulations*, based on a referral from the Chairman.” (emphasis added)); 8 CFR 1003.1(e)(8) (setting timeliness benchmarks for Board adjudications which, if exceeded, may warrant referral of cases to the Director for a timely adjudication).

Many comments are based on erroneous premises. For instance, many comments object to the IFR because the Director or the Assistant Director for Policy are allegedly political appointees. A political appointee is a full-time, non-career Presidential or Vice-Presidential appointee, a non-career Senior Executive Service (“SES”) (or other similar system) appointee, or an appointee to a position that has been excepted from the competitive service by reason of being of a confidential or policy-making character (Schedule C and other positions excepted under comparable criteria) in an executive agency. *See, e.g.*, Exec. Order 13770, sec. 2(b) (Jan. 28, 2017) (“Ethics Commitments by Executive Branch Appointees”); *see also* Edward “Ted” Kaufman and Michael Leavitt Presidential Transitions Improvements Act of 2015, Pub. L. 114-136, sec. 4(a)(4), (5) (2016). No employee currently at EOIR, including the Director or the Assistant Director for Policy, falls within these categories.

EOIR has no Schedule C positions or positions requiring appointment by the President or Vice President. Both the Director and the Assistant Director for Policy are career appointees within the SES. Although the Director is a general SES position, it has traditionally been filled only by a career appointee, and the incumbent Director serves through a career appointment. The Assistant Director for Policy is a career-reserved position in the SES and may be filled only by a career appointee. *See* SES Positions That Were Career Reserved During CY 2018, 85 FR 9524, 9581 (Feb. 19, 2020) (listing the Assistant Director for Policy at EOIR as a career reserved position). In short, all of EOIR’s federal employees, including the Director and the Assistant



Director for Policy, are career employees chosen through merit-based processes, and none of EOIR's employees are political appointees.<sup>3</sup>

Many comments object to the IFR by asserting that the Director is merely an administrator with no adjudicatory role and no subject matter expertise regarding immigration law. Longstanding regulations make clear, however, that the Director must have significant subject matter expertise in order to issue instructions and policy, including regarding the implementation of new legal authorities. *See* 8 CFR 1003.0(b)(1)(i). The Director must also administer an examination on immigration law to new immigration judges and Board members and must provide for "comprehensive, continuing training" in order to promote adjudicative quality. 8 CFR 1003.0(b)(1)(vi), (vii). Moreover, the Director was given explicit adjudicatory review authority involving R&A cases in January 2017, well before the IFR was promulgated. *See* 81 FR at 92357 ("Additionally, the final rule provides that organizations whose requests for reconsideration are denied may seek administrative review by the Director of EOIR. *See* final rule at 8 CFR 1292.18. This provision responds to concerns that OLAP would be the sole decision-maker regarding recognition and accreditation and that another entity should be able to

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<sup>3</sup> Most, if not all, of the comments opposing the IFR because the Director and the Assistant Director for Policy are alleged political appointees assume that any employee appointed to an agency position by an agency head, such as the Attorney General, is necessarily a political appointee. By statute, regulation, policy, or to comply with the Appointments Clause of the Constitution, approximately 530 positions at EOIR currently require appointment by the Attorney General, including Board members, immigration judges, and administrative law judges. The fact that the Attorney General, who is a political appointee, appoints an individual to a position does not convert that position to a political position.

Moreover, even if the Director position were filled by a political appointment, that fact alone would not render the individual a biased adjudicator incapable of adjudicating cases under the regulations. *Cf. Matter of L-E-A-*, 27 I&N Dec. 581, 585 (A.G. 2019) (rejecting arguments that the Attorney General is a biased adjudicator of immigration cases in the absence of any personal interest in the case or public statements about the case). After all, the functions of EOIR are vested in the Attorney General, who is a political appointee, and the INA specifically provides that determinations in immigration proceedings are subject to the Attorney General's review. 28 U.S.C. 503, 509, 510; INA 103(g) (8 U.S.C. 1103(g)).

review OLAP's decisions.”). In short, existing regulations already require some level of subject-matter knowledge by the Director and provide for the Director to have an adjudicatory role in addition to administrative duties. Thus, the IFR does not alter the nature of the Director position.

In addition, and consistent with the clarification in this final rule of the Director's adjudicatory role, the final rule edits potentially confusing regulatory language in 8 CFR 1292.6 to make clear that the Director, when conducting an administrative review of R&A cases under 8 CFR 1292.18, does interpret the regulatory provisions governing the R&A Program, 8 CFR 1292.11 through 1292.20. *See infra* Part III.

Some comments object to the IFR because it contains an alleged delegation of the Board's authority to the Director. However, the Director directs and supervises the Board, 8 CFR 1003.0(b)(1), and the Board cannot delegate authority upward to a manager. Moreover, the Board's authority comes from the Attorney General, and it is his authority to delegate, not the Board's. INA 103(g) (8 U.S.C. 1103(g)); 28 U.S.C. 509, 510. Accordingly, the IFR does not reflect a delegation of authority from the Board to the Director; it reflects a delegation of authority from the Attorney General to the Director.

In the aggregate, many of the comments are internally inconsistent or illogical. For example, some comments object to the placement of OLAP under the Office of Policy, alleging that OLAP should not be under a political appointee; yet, many of those comments also allege that the Director, who supervised OLAP for several years prior to its transfer to the Office of Policy and under whom OLAP would have remained if it had not been transferred, is a political appointee. Similarly, other comments that allege the Director is a political appointee also object to delegating authority from the Attorney General to the Director, paradoxically preferring to

retain authority in the Attorney General, who is a political appointee, rather than in the Director, who is not, in fact, a political appointee.

Overall, and as discussed in more detail below, the Department generally declines to adopt the recommendations of comments that misstate the IFR, that are based on incorrect legal or factual premises, or that are internally or logically inconsistent.

#### B. Comments Expressing Support

*Comment:* Two commenters expressed support for the IFR for reasons unrelated to its substance. One commenter indicated support for building a border wall between the United States and Mexico and urged that other individuals go to Central America to improve living conditions there. Another commenter expressed general opposition to immigration.

*Response:* Such comments are beyond the scope of this rulemaking.

#### C. Comments Expressing Opposition

##### 1. *General Opposition to the IFR*

*Comment:* The Department received several comments expressing general opposition to the IFR, with little to no further explanation. One commenter stated that such a “pivotal” topic requires deep discussion.

*Response:* The Department is unable to provide a more detailed response because these comments failed to articulate specific reasoning underlying expressions of general opposition.

##### 2. *Office of Legal Access Programs*

###### a. *Viability of OLAP and its programming*

*Comment:* The Department received numerous comments opposing the transfer of OLAP and its responsibilities to OP. Commenters stated that transferring OLAP’s current functions to OP and removing references to OLAP and OLAP’s Director from the regulations

effectively eliminates OLAP. One commenter expressed concern that the IFR transferred OLAP's functions to OP without ensuring that the Department will continue to prioritize the programs OLAP administers. Several commenters stated that because the IFR eliminated OLAP and because OP assumed OLAP's responsibilities, many of the programs administered by OLAP that ensure access to counsel are at risk of being eliminated.

Regarding specific programming, one commenter expressed concern that moving the R&A Program into OP would grant authority to the Assistant Director for Policy to make R&A Program determinations. This commenter stated that because the Assistant Director for Policy could be a political appointee, the objectivity of R&A Program determinations could be affected. Several organizations stated that they were concerned the IFR will weaken or lead to the dismantling of the LOP and the LOPC. One commenter asserted that if the LOPC is dissolved or mismanaged, children in immigration proceedings would be adversely affected because their understanding of the legal process would decrease. The commenter further asserted that affected children would lose access to justice and representation, which would increase failures to appear at initial court hearings.

A few commenters expressed concern that, based on "the Office of Policy's recent history and relationship with migrants," moving OLAP under OP is "a first step towards reducing access to counsel rather than expanding it." One commenter argued that placing OLAP in OP "creates an incentive for OLAP to disseminate information that discourages certain individuals, deemed undesirable by the Executive Branch, from pursuing their legal rights."

*Response:* The Department notes that any implication that the IFR eliminated OLAP or its functions is inaccurate, to include comments that a change in functions included a substantive change in the management of the R&A Program or the LOP. As the Department wrote in the

IFR, this rule “is not intended to change—and does not have the effect of changing—any of OLAP’s current functions.” 84 FR at 44539. The Department notes that OLAP’s current functions continue as part of OP under the supervision of a member of the SES. *See Office of Legal Access Programs*, EOIR, U.S. Dep’t of Justice, <https://www.justice.gov/eoir/office-of-legal-access-programs> (last updated Feb. 19, 2020).

OLAP (formerly known as the Legal Orientation and Pro Bono Program) has never been a separate component formally appearing on EOIR’s official organizational chart. Rather, since its establishment in 2000, OLAP has existed under multiple different components within EOIR. *See* 84 FR at 44537. In 2000, OLAP existed as part of OOD; in 2002, it moved from OOD to OGC; in 2009, it moved from OGC to the BIA; and in 2011, it moved from the BIA back to OOD. *See id.* The IFR again moved OLAP within EOIR’s organizational structure—this time to OP pursuant to the Department’s reasoned analysis, as stated in the IFR, that OP is better suited to support OLAP. *See* 84 FR at 44539 (finding “no organizational justification” for OLAP to be part of OOD and determining that OP would be better suited to support OLAP’s role and most effectively “help coordinate OLAP’s work across adjudicatory components”). The Department rejects the suggestion that OLAP’s placement under OP would “incentivize” OLAP to engage in any action other than continuing its current missions, and the IFR—by its own terms—does nothing to change OLAP’s functions.

Since the establishment of the R&A Program in 1984, multiple components have been responsible for maintaining it. From 1984 until 2017, the BIA ran the R&A Program.<sup>4</sup> *See* Requests for Recognition; Accreditation of Representatives, 49 FR 44084 (Nov. 2, 1984). In

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<sup>4</sup> The Department notes that OLAP was part of the BIA for a portion of that period.

2017, the Department transferred the R&A Program to OLAP, which at the time was a part of OOD. *See* 81 FR at 92347. In contrast to commenters' concerns that the R&A Program will be removed or limited, the IFR plainly requires OP to "maintain a division within the Office of Policy to develop and administer a program to recognize organizations and accredit representatives to provide representation before [EOIR or DHS]." 8 CFR 1003.0(e)(3).

In response to commenters' concerns that placing OLAP under the supervision of OP would undermine the objectivity of decisions regarding R&A Program determinations, the Department emphasizes that EOIR staff, including the Assistant Director for Policy, are career employees. OP is charged with making policy determinations as authorized by Congress and the Attorney General in furtherance of EOIR's mission. The Department has provided a more detailed discussion of OP as a neutral component within EOIR below. *See infra* Part II.C.3.c.

In response to commenters' concerns that the rule might undermine EOIR's LOP programs, the Department notes that the IFR did not alter any aspect of any LOP program and is not addressed to any particular aspect of LOP programs. It did not alter the mission, funding, or day-to-day operations of LOP programs, other than to reassign supervisory responsibilities over OLAP from the Director to the Assistant Director for Policy.

b. Elimination of OLAP and effect on individuals and organizations

*Comment:* Several commenters indicated that moving OLAP to OP will have an adverse effect on their organizations' ability to provide competent, low-cost legal representation, which would in turn adversely affect individuals in immigration proceedings. Specifically, commenters alleged that the IFR either threatens to restrict or completely eliminates the R&A Program, without which organizations would have to reduce the services that are currently provided. Several commenters asserted that because the IFR dissolves OLAP, the IFR will harm children

because they will have less meaningful access to effective legal representation during immigration proceedings. Commenters stated that without the R&A Program, thousands of low-income immigrants, including abused women and children, will lose access to legal advocates. One commenter stated that because of the possible loss in services, the rule undermines the key goals of non-profit immigration legal service organizations and the services they provide to low-income clients.

*Response:* As noted above, the IFR does not alter either OLAP's functions or the R&A Program. Further, the Department sees no connection between the move of OLAP to OP and any organization's abilities to provide competent, low-cost legal representation. It is not OLAP's mission to provide legal representation. Rather, one of its duties is to oversee the R&A Program, and supervision of OLAP's management of that program is now a duty of the Assistant Director of the Office of Policy rather than of the Director. In short, the IFR merely moved oversight of the R&A Program from one non-adjudicatory component of EOIR (OOD) to another (OP). Far from eliminating the R&A Program, the IFR clearly specified that OP will continue to maintain the program, including a mechanism for determining "whether an organization and its representatives meet the eligibility requirements for recognition and accreditation in accordance with this chapter." 8 CFR 1003.0(e)(3).<sup>5</sup>

Also of note, the move of OLAP into OP, including the R&A Program, did not affect the regulatory criteria for recognizing an organization, 8 CFR 1292.11(a)(1)–(5), or accrediting a representative, 8 CFR 1292.12(a)(1)–(6). The only change was to authorize the Assistant Director for Policy to make such determinations based on the regulatory criteria. While the IFR

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<sup>5</sup> The Department notes that the instructions regarding the R&A Program in OP's regulations at 8 CFR 1003.0(e) are the same as those that were previously set out for OLAP in 1003.0(f)(2) with "Assistant Director for Policy" inserted instead of "OLAP Director."

provided the Assistant Director for Policy with the R&A Program authority by replacing “OLAP Director” with “Assistant Director for Policy,” the IFR further allowed the Assistant Director for Policy to delegate the authority to recognize an organization or accredit a representative. *See, e.g.,* 8 CFR 1292.11(a) (“or the Assistant Director for Policy’s delegate”). At this time, such authority has been delegated to the OLAP Director. In sum, the IFR did not effectuate any substantive change to the R&A Program and certainly no change that would impact the ability of organizations to provide competent, low-cost legal representation.

### 3. *Office of Policy*

#### a. Legal legitimacy

*Comment:* Numerous commenters stated, without more, that OP lacks legal legitimacy because it was created without regulatory or statutory authority. One commenter noted that OP was not created via notice and comment<sup>6</sup> and that there was not a press release or other information about its creation on the Department’s website.

*Response:* Following a proposal by the Director, the Attorney General created OP in 2017 in accordance with all relevant statutory and regulatory authority. The Director has the authority to “propose the establishment, transfer, reorganization or termination of major functions within his organizational unit as he may deem necessary or appropriate.” 28 CFR 0.190(a). The Director proposed the creation of OP “to, *inter alia*, issue operational instructions and policy, administratively coordinate with other agencies, and provide for training to promote quality and consistency in adjudications.” 84 FR at 44538. The proposed EOIR reorganization received all necessary intermediate Department approvals. *See* 28 CFR 0.190(a). As the head of

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<sup>6</sup> For further discussion on comments addressing notice-and-comment procedures, see the discussion in Part II.D.1 of this preamble.



the Department, 28 U.S.C. 503, the Attorney General supervises and directs the administration and operation of the Department, and the Attorney General issued a new organizational chart for EOIR on July 26, 2017, approving EOIR's new organizational structure, which included OP. *See* EOIR, U.S. Dep't of Justice, *Executive Office for Immigration Review Organization Chart* (July 26, 2017), <https://www.justice.gov/eoir/eoir-organization-chart/chart>. When OP was created, the Department was required to reprogram appropriated funds. In accordance with the Consolidated Appropriations Act, 2017, and the Continuing Appropriations Act, 2018, the Department notified the House and Senate Committees on Appropriations of the change. *See* Consolidated Appropriations Act, 2017, Pub. L. 115-31, div. B, tit. V, sec. 505, 131 Stat. 135, 220 (2017) ("None of the funds provided under this Act . . . shall be available for obligation or expenditure through a reprogramming of funds that . . . (5) reorganizes or renames offices, programs or activities . . . unless the House and Senate Committees on Appropriations are notified 15 days in advance of such reprogramming of funds."); Continuing Appropriations Act, 2018, Pub. L. 115-56, div. D, secs. 101(a)(2), 103, 131 Stat. 1139, 1139, 1141 (2017) (continuing appropriations for the Department under the same terms as the Consolidated Appropriation Act, 2017). Both committees indicated a lack of objection to the proposed reorganization in October 2017, and EOIR began to implement the reorganization in November 2017. The updated EOIR organizational chart was placed on the EOIR homepage on December 11, 2017.

The Department was not obligated to engage in rulemaking or a notice-and-comment period to create OP as a new component within EOIR. *See* 5 U.S.C. 553(b)(A) (providing that changes in internal agency organization are excepted from notice-and-comment requirements). In accordance with section 103(g) of the Act (8 U.S.C. 1103(g)), the Attorney General has

delegated authority to the Director to manage the operations of EOIR. 8 CFR 1003.0(a), (b). Transferring authority from one office to another constitutes an internal operational change in line with the Director's operational management responsibilities under 8 CFR 1003.0(a) and (b). Moreover, the regulations are not meant to provide a complete, detailed description of the entirety of EOIR's organization, and the decision to memorialize some organizational changes by regulation does not mean that all internal organizational changes are required to be done through a regulation.<sup>7</sup>

b. Conflict with the rule that established the R&A Program

*Comment:* The Department received several comments stating that appointing the Assistant Director for Policy as head of OLAP and moving OLAP into OP directly contradicts the 2016 rule regarding authorization of representatives. *See* 81 FR at 92346. These commenters also averred that the move violated the intent and particular requirements of the 2016 rule, without providing specific concerns.

*Response:* Without further information regarding the specific conflicting provisions or specific concerns, the Department is unable to provide a more detailed response. The Department promulgated the 2016 rule to (1) provide requirements and procedures for authorized representatives to represent individuals before EOIR and DHS, and (2) revise EOIR's disciplinary procedures. *Id.* The Department clearly stated that the purpose of the 2016 rule was "to promote the effective and efficient administration of justice before DHS and EOIR by increasing the availability of competent non-lawyer representation for underserved immigrant populations." Recognition of Organizations and Accreditation of Non-Attorney Representatives,

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<sup>7</sup> For example, the Department notes that OLAP was not memorialized in the regulations until 2017 even though it had existed since 2000 and been transferred among components multiple times. 84 FR at 44539.

80 FR 59514, 59514 (Oct. 1, 2015) (notice of proposed rulemaking). The IFR did not conflict with that purpose; rather, the IFR furthered that purpose by making organizational changes within the agency that better facilitate efficiency and effectiveness across OLAP programs, including administration of the R&A Program. *See* 84 FR at 44537, 44539. Just as the Department moved the R&A Program from the BIA to OLAP in 2017, the Department's choice to now place authority over the R&A Program with the Assistant Director for Policy was a decision of agency management or personnel and an organizational choice based on EOIR's needs.

c. Propriety of a policy office within EOIR

*Comment:* Some commenters opposed the rule's "formalization" of OP because they generally opposed the existence of a policy office in EOIR. Commenters stated that OP "conflicts with the fundamental mission of EOIR" because its objectives and focus "are controlled directly by the Attorney General and EOIR Director." Commenters believed that the creation of OP would change EOIR from an entity focused on impartial adjudications for individual immigration cases to, as one commenter explained, an "extension of the Attorney General's and EOIR Director's immigration policy." Overall, commenters expressed concern that having OP within EOIR improperly politicizes the agency, whose mission is to adjudicate individual cases rather than make policy.

*Response:* The Department disagrees with commenters' statements that it is inappropriate for EOIR to have a policy office. EOIR's primary mission is the adjudication of immigration cases by fairly, expeditiously, and uniformly interpreting and administering the Nation's immigration laws, primarily pursuant to the Act. This mission remains unchanged by the IFR, and EOIR continues to work towards fulfilling this mission by increasing efficiencies

wherever possible. Creating OP improved efficiency by reducing redundant activities performed by multiple components while also ensuring consistent coordination of regulatory and policy activities across all components.

OP was established to assist in effectuating the regulatory authorities granted to the Director such as issuing operational instructions and policy, administratively coordinating with other agencies, and providing for training to promote quality and consistency in adjudications. *See* 84 FR at 44538; 8 CFR 1003.0(b)(1). Some of these functions were previously performed by OGC, but were transferred to OP because of their policymaking nature and to ensure sufficient resources for those programs. 84 FR at 44538.

The non-adjudicatory policymaking functions now performed by OP are not new functions to the Department or to EOIR. The Department first explicitly codified the Attorney General's delegation of non-adjudicatory policymaking authority with respect to EOIR in the CFR in 2007, but such authority has existed throughout EOIR's history. *See* *Authorities Delegated to the Director of the Executive Office for Immigration Review, and the Chief Immigration Judge*, 72 FR 53673, 53676–77 (Sept. 20, 2007) (revising 8 CFR 1003.0 and 8 CFR 1003.9 to include policymaking authority). Since its inception in 1983, EOIR has implemented regulations, issued policy memoranda, and more generally engaged in policymaking in order to achieve its mission. *See, e.g.,* Office of the Chief Immigration Judge, EOIR, U.S. Dep't of Justice, *Operating Policies and Procedures 84-1: Case Priorities and Processing* (Feb. 6, 1984), <https://www.justice.gov/sites/default/files/eoir/legacy/2001/09/26/84-1.pdf>. EOIR is subject to the direction and regulation of the Attorney General, who may establish regulations or “issue such instructions, review such administrative determinations in immigration proceedings,

delegate such authority, and perform such other acts as the Attorney General determines to be necessary” for the Attorney General’s supervision of EOIR. 8 U.S.C. 1103(g).

Moreover, as discussed in Part II.A of this preamble, neither the Assistant Director for Policy nor the Director are political appointees. Instead, both positions, as well as all other EOIR senior leadership positions, are held by members of the SES serving on career appointments. The SES is composed of members who serve in key positions, operating and overseeing nearly every government function. *See generally Senior Executive Service*, Office of Personnel Management, <https://www.opm.gov/policy-data-oversight/senior-executive-service/> (last visited June 12, 2020). That the Attorney General continues to oversee the functions of EOIR is also proper: a long-held principle of administrative law is that an agency, within its congressionally delegated policymaking responsibilities, may “properly rely upon the incumbent administration’s view of wise policy to inform its judgments.” *Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 865 (1984).

The Department also notes that many other agencies include policy offices within their organizational structure—even when those agencies also perform adjudicatory functions. For example, the Social Security Administration, which conducts administrative hearings regarding appeals of benefits or program eligibility, has an Office of Financial Policy and Operations, an Office of Disability Policy, and an Office of Data Exchange, Policy Publications and International Negotiations. *See* U.S. Soc. Sec. Admin., *Social Security Administration Organizational Chart* (June 21, 2020), <https://www.ssa.gov/org/ssachart.pdf>. Similarly, the Department of Veterans Affairs includes adjudicatory components and an Office of Regulatory Policy and Management. *See* U.S. Dep’t Vet. Aff., *2019 Functional Organizational Manual Version 14–15* (Dec. 21, 2018), <https://www.va.gov/FOM-5-Final-July-2019.pdf>. In short, there

is nothing anomalous or improper about EOIR maintaining an Office of Policy to address policy matters outside of the adjudicatory context.

d. Office of Policy's expertise

*Comment:* Commenters specifically expressed opposition to the IFR's conferment of authority to the Assistant Director for Policy to oversee OLAP because commenters stated that the Assistant Director for Policy, and by extension OP, lacks the qualifications and expertise necessary to run OLAP and carry out its mission. Some commenters were concerned that, at the least, OLAP's commitment to "improve the efficiency of immigration court hearings by increasing access to information and raising the level of representation for individuals appearing before the immigration courts and BIA" would not remain a priority under OP's purview. Accordingly, commenters stated that moving OLAP and its legal access programs to OP was structurally "irrational." Commenters stated that OLAP contains programmatic functions, not policy-related functions, and is thus outside the scope of the "politicized" Office of Policy, which is responsible for policy and regulations. Some commenters suggested that the Department should transfer OLAP back to the Office of the Director, where it more appropriately belongs.

Commenters specifically referenced OLAP's R&A Program, the National Qualified Representative Program ("NQRP"), and the LOP, all of which, they write, involve administering and managing congressionally appropriated funds and federal grants. Commenters stated that the Assistant Director for Policy, and a policy office generally, has no expertise in administering or managing such funds and grants. Commenters also specifically stated that OP lacks expertise and interest in fostering legal access and representation, which detrimentally impacts OLAP's programming (especially the R&A Program), the organizations involved, and the individuals

served. Relatedly, commenters stated that the Assistant Director for Policy lacks expertise in adjudicating R&A Program applications.

*Response:* As stated in the IFR, “the rule is not intended to change—and does not have the effect of changing—any of OLAP’s current functions.” 84 FR at 44539. Moving OLAP to OP will ensure better programmatic management, provide for better coordination among EOIR’s adjudicatory operations, and provide increased flexibility to fulfill OLAP’s mission. *See id.* The Department is confident that OP is equipped to provide OLAP with the necessary resources and expertise to accomplish those initiatives.

Additionally, as stated above, the Assistant Director for Policy, who oversees OP, is a career-reserved SES position. *See* 85 FR at 9524. To be hired into these positions, members of the SES must possess the skills necessary to oversee and manage programmatic functions, such as those inherent to OLAP and identified by commenters. Moreover, when OLAP was housed in the Office of the Director, it was also supervised by a member of the SES serving on a career appointment—the Director. Thus, moving OLAP to OP neither places it under a political appointee nor diminishes its access to programmatic expertise or resources, and the Assistant Director for Policy is fully qualified to oversee such functions. At the same time, the Director continues to supervise every EOIR component, *see* 8 CFR 1003.0(b)(1), including OP. As such, OLAP ultimately remains subject to the direction of the Director even following its placement within OP. And, regardless of OLAP’s ultimate placement, it remains free from any alleged direct political interference because all EOIR components are headed by career SES members, not political appointees.

*Comment:* One commenter explained that moving broad, policy-oriented tasks from OGC to OP prevents the Department from “capitalizing on [OGC’s] expertise[] and on OGC’s

extensive institutional knowledge.” Similarly, another commenter stated that shifting responsibility for regulatory matters to OP ignores OGC’s years of substantive expertise. That commenter also stated that the rule narrows OGC’s role to focus almost exclusively on its role as legal counsel to the Director to the exclusion of its role in providing legal interpretation on substantive immigration policy matters.

*Response:* The EOIR General Counsel, under the supervision of the Director, serves as the chief legal counsel of EOIR for matters of immigration law. 8 CFR 1003.0(f). Following the IFR, OGC continues to oversee and perform many functions within EOIR, including employee discipline, ethics, anti-fraud efforts, practitioner discipline, privacy, Freedom of Information Act requests, and litigation support. *See id.*; *see also Office of the General Counsel*, EOIR, U.S. Dep’t of Justice, <https://www.justice.gov/eoir/office-of-the-general-counsel> (last updated Aug. 13, 2018).

In recent years, OGC’s work in performing these functions has grown increasingly more complicated. For example, in Fiscal Year 2018, EOIR received 52,432 FOIA requests, a nearly 100 percent increase from the total received in Fiscal Year 2014, when 26,614 were received. *See* U.S. Dep’t of Justice, *United States Department of Justice Annual Freedom of Information Act Report: Fiscal Year 2018*, pt. V.A, <https://www.justice.gov/oip/page/file/1135751/download>; U.S. Dep’t of Justice, *United States Department of Justice Annual Freedom of Information Act Report: Fiscal Year 2014*, pt. V.A, <https://www.justice.gov/sites/default/files/oip/pages/attachments/2014/12/24/oip-foia-fy14.pdf>.

Because of this increased scope of authority and responsibility, the Department moved the regulatory development and review authority from OGC into OP to ensure that sufficient resources are available across the offices for all of the agency’s needs and to increase efficiency



and streamline the policymaking process within EOIR. Additionally, the programs that were previously under OGC, such as regulatory development and review, involve a substantial policy role. To have functions of this nature in OGC is incongruous with OGC's goals of providing legal counsel to all of EOIR, including the three adjudicatory components. Transferring programs that have a heavy emphasis on policymaking from OGC into OP better permits OGC to focus on its role as general counsel to EOIR and better separates the division between legal counsel and policy choices while also increasing overall efficiency within EOIR's non-adjudicatory components.

Additionally, contrary to the commenter's suggestion, OGC's role has never been to provide legal interpretations on substantive matters of immigration law that would otherwise bind EOIR. To the contrary, under both the prior and the current regulation, OGC was excluded from supervisory activities related to the adjudication of cases and prohibited from influencing the adjudication of specific cases. The IFR simply clarified OGC's role on this point.

The Department further notes that although OP is a newly formed office within EOIR, the institutional knowledge and records from OGC remain within EOIR. OGC and OP have worked closely and continue to work closely to ensure that institutional knowledge is properly shared and resources remain available for all of EOIR's work.

#### *4. Director's Authority*

##### *a. Due process*

*Comment:* Commenters expressed concern that the IFR undermined due process or contributed to an appearance of undermined due process. Commenters expressed general sentiment that the IFR was contrary to the Nation's tradition of due process, and commenters noted specific provisions that undermined due process or contributed to such appearance—

namely, provisions that delegated authority to the Director to issue precedential decisions because such delegation is not an appropriate authority for the Director. *See* 8 CFR 1003.1(e)(8)(ii).

*Response:* Contrary to the commenters' concerns, the IFR's changes do not undermine due process. The essence of due process in an immigration proceeding is notice and an opportunity to be heard. *LaChance v. Erickson*, 522 U.S. 262, 266 (1998) ("The core of due process is the right to notice and a meaningful opportunity to be heard."). Nothing in the rule eliminates notice of charges of removability against an alien, 8 U.S.C. 1229(a)(1), or the opportunity for the alien to make his or her case to an immigration judge, 8 U.S.C. 1229a(a), or on appeal, 8 CFR 1003.38.

Further, although due process requires a fair tribunal, *In re Murchison*, 349 U.S. 133, 136 (1955), generalized, ad hominem allegations of bias or impropriety are insufficient to "overcome a presumption of honesty and integrity in those serving as adjudicators," *Withrow v. Larkin*, 421 U.S. 35, 47 (1975). Commenters identified no reason why it would be inappropriate for a career SES official with no pecuniary or personal interest in the outcome of immigration proceedings, such as the Director, to adjudicate appeals in specific circumstances, particularly since the Director had already been delegated adjudicatory authority through a prior rulemaking with no noted concerns regarding due process. *See* 8 CFR 1292.18; *cf. Matter of L-E-A-*, 27 I&N Dec. at 581, 585 (A.G. 2019) (rejecting arguments that the Attorney General is a biased adjudicator of immigration cases in the absence of any personal interest in the case or public statements about the case).

Additionally, the Department notes that the Attorney General oversees EOIR and has statutory authority to, among other responsibilities, review administrative determinations in

immigration proceedings; delegate authority; and perform other actions necessary to carry out the Attorney General's authority over EOIR. INA 103(g) (8 U.S.C. 1103(g)). Over time, the Attorney General has promulgated regulations pursuant to this statutory authority that reflect the full range of his authority and oversight in section 103(g) of the Act (8 U.S.C. 1103(g)). Among many examples, in 8 CFR 1003.1(h), the Attorney General codified the authority to review BIA decisions, and in 8 CFR 1003.0(a), the Attorney General delegated authority to the Director to head EOIR. Despite this delegated authority, EOIR remains subject to the Attorney General's oversight, and it is reasonable and proper that the Attorney General continue to exercise that oversight by way of administrative review.<sup>8</sup>

In accordance with 8 CFR 1003.0(a), the Director, who is appointed by the Attorney General, exercises delegated authority from the Attorney General related to oversight and supervision of EOIR. *See also* INA 103(g)(1) (8 U.S.C. 1103(g)(1)); 28 CFR 0.115(a). The Director may only act in accordance with the statutes and regulations and within the authority delegated to him by the Attorney General; put differently, the statute and regulations provide the Attorney General with the authority to act, and the Attorney General, in turn, determines the extent of the Director's authority. The Attorney General, by regulation, provides a list of the Director's authority and responsibilities at 8 CFR 1003.0(b), which includes the authority to "[e]xercise such other authorities as the Attorney General may provide." 8 CFR

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<sup>8</sup> Numerous other agencies employ a similar structure and grant agency heads the authority to review administrative decisions. For example, the Department of the Interior ("DOI") Office of Hearings and Appeals ("OHA") uses three types of review boards for various matters before the agency, and the DOI OHA Director, as the authorized representative of the DOI Secretary, may participate in the consideration of appeals and sign the resulting decisions. *See* 43 CFR 4.1, 4.2(b). Similarly, the Secretary of Agriculture has delegated authority to a Judicial Officer to act as a final deciding officer in various adjudicatory proceedings within the Department of Agriculture. *See* 7 U.S.C. 2204-2; 7 CFR 2.35. The use of this general structure across agencies illustrates that it does not offend or undermine the tradition of due process.

1003.0(b)(1)(ix). Such delegation supersedes the restrictions related to adjudication outlined in 8 CFR 1003.0(c) due to that paragraph's deference to 8 CFR 1003.0(b).

The Director's authority provided in the IFR to adjudicate BIA cases that have otherwise not been timely adjudicated constitutes "such other authorities" provided to the Director by the Attorney General, based on the powers to delegate and conduct administrative review under INA 103(g) (8 U.S.C. 1103(g)). *See* 8 CFR 1003.0(c); 8 CFR 1003.1(e)(8)(ii). To reiterate, the Attorney General's authority to review administrative determinations does not violate due process; thus, the proper delegation of that authority to the Director pursuant to statute and pre-existing regulations does not violate due process—specifically in light of the fact that those decisions ultimately remain subject to the Attorney General's review under 8 CFR 1003.1(e)(8)(ii). To the extent that commenters are concerned about such an appearance, the Department emphasizes the clear, direct intent of Congress in statutorily authorizing such delegations, and the Attorney General acted within the bounds of his statutory authority when he issued the IFR. INA 103(g)(2) (8 U.S.C. 1103(g)(2)); *see also Chevron*, 467 U.S. at 842.<sup>9</sup> In issuing the IFR, the Attorney General properly delegated adjudicatory authority to the Director to review certain administrative decisions that are otherwise untimely. 8 CFR 1003.1(e)(8)(ii).

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<sup>9</sup> Further, even assuming that the congressional intent regarding the scope of the Attorney General's authority to delegate power is unclear, the Supreme Court has afforded *Chevron* deference to an agency's interpretation of an ambiguous statutory provision concerning the scope of the agency's statutory authority if the statute does not foreclose that interpretation. *See City of Arlington, Tex. v. FCC*, 569 U.S. 290, 296–97, 307 (2013) ("Where Congress has established a clear line, the agency cannot go beyond it; and where Congress has established an ambiguous line, the agency can go no further than the ambiguity will fairly allow."). The INA does not foreclose the Attorney General's delegation of authority as articulated in the IFR; in fact, it provides that the Attorney General shall delegate such authority as he determines to be necessary to carry out the immigration functions of EOIR. INA 103(g)(2) (8 U.S.C. 1103(g)(2)).

This delegation aligns with the Attorney General’s longstanding authority to issue regulations and delegate that authority, in line with principles of due process.<sup>10</sup>

*Comment:* Commenters stated that the IFR is contrary to the immigration court system’s traditions of the rule of law and due process. Commenters stated that the rule undermines the entire immigration system by threatening access to fair process and thus justice. Some commenters alleged this was in fact the purpose in issuing the IFR.

One commenter stated that the rule fails to provide constitutional protections that ensure due process, specifically that individuals lack “standard procedural protections, such as notice and an opportunity to be heard” if the Director selects an individual’s case for adjudication. The commenter stated that, “[i]n other words, an individual may have their case adjudicated by the Director (or his designee) at any stage in his or her immigration proceeding, without any prior notice that the Director (or his designee) is reviewing the case and without any opportunity to directly address the decisionmaker (either in a hearing or via briefing) regarding the adjudication.”

Another commenter specifically opposed the rule’s delegation of certification power to the Director, explaining that such power exercised by the Attorney General was already problematic because it was “generally driven by political decision making and a prosecutorial agenda.” The commenter stated that extending that power to the Director only furthered the problems the commenter sees in the Attorney General’s certification power. Another commenter stated that such power was unaccountable to the legislative and judicial branches of government, which also undermines democratic principles.

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<sup>10</sup> The Department notes that it received no complaints and has no record of any concerns being raised about due process when the Director was first delegated adjudicatory authority regarding R&A cases in 2017.

*Response:* The Department disagrees that the IFR undermined the rule of law and due process within the immigration court system. It does not restrict notice and an opportunity to be heard, and it does not threaten access to justice or fair process.

The agency continues to fairly, expeditiously, and uniformly interpret and administer the Nation's immigration laws. *See About the Office*, EOIR, U.S. Dep't of Justice, <https://www.justice.gov/eoir/about-office> (last updated Aug. 14, 2018). Immigration judges, Board members, the Director, and the Attorney General continue to exercise independent judgment and discretion in accordance with the case law, statutes, and regulations to decide each case before them. *See* 8 CFR 1003.10(b) (immigration judges), 1003.1(d)(1) (BIA members), 1003.1(e)(8)(ii) (Director and Attorney General), 1003.1(h) (Attorney General); *see also* INA 103(g)(1) (8 U.S.C. 1103(g)(1)). Further, the IFR did not affect the mechanisms previously provided for review—a respondent may still appeal a decision, in accordance with the statutes and regulations, from an immigration judge to the BIA. 8 CFR 1003.38. Cases may still be referred to the Attorney General. 8 CFR 1003.1(e)(8)(ii), (h). The IFR delegated authority to the Director to decide certain cases, but those decisions are subject to review by the Attorney General, either at the Director's or Attorney General's request. 8 CFR 1003.1(e)(8)(ii). Further, decisions of the BIA, the Director, and the Attorney General are each subject to review by federal courts of appeals. INA 242 (8 U.S.C. 1252).

As discussed in Part II.A of this preamble, the Director will only adjudicate cases on appeal that have exceeded regulatory deadlines, which would only occur after the record is complete, including the submission of briefs. Consequently, contrary to the comments, the Director cannot merely pick any case at all at any time for adjudication, and the alien whose case is referred to the Director will have already had the opportunity to brief any issues. The

specified time period in 8 CFR 1003.1(e)(8)(ii), after which the Director may review a case, accounts for the timeframes in 8 CFR 1003.3(c)(1) and 1003.38 to file the Notice of Appeal (Form EOIR-26), briefs, and other documents. Accordingly, the Director would decide the case based on the same record that would have been before the BIA. Overall, respondents with cases before the Director, as provided in the IFR, retain the same rights and remain in the same situation as if their cases were before the BIA.

As stated in the preamble, given the heightened number of appeals filed and pending with the BIA and the decreased number of completions, the IFR sought to facilitate efficient dispositions of cases on appeal. 84 FR at 44538; *see also* EOIR, U.S. Dep’t of Justice, *Adjudication Statistics: All Appeals Filed, Completed, and Pending* (Oct. 23, 2019), <https://www.justice.gov/eoir/page/file/1199201/download>. In addition to the IFR, recent agency initiatives demonstrate the agency’s genuine commitment to efficiently addressing the BIA’s pending caseload. *See* EOIR, U.S. Dep’t of Justice, *Policy Memorandum 20-01: Case Processing at the Board of Immigration Appeals* (Oct. 1, 2019), <https://www.justice.gov/eoir/page/file/1206316/download> (explaining various agency initiatives, including an improved BIA case management system, issuance of performance reports, and a reiteration of EOIR’s responsibility to timely and efficiently decide cases in serving the national interest).

The Department declines to adopt the specific request for “notice that the Director (or his designee) is reviewing the case” and “opportunity to directly address the decision maker (either in a hearing or via briefing) regarding the adjudication.” EOIR does not currently provide the identity of the specific Board member adjudicating a case prior to the issuance of a decision, and the identity of the adjudicator should be irrelevant to the outcome of the adjudication. Thus,

providing notice that the Director will be the adjudicator serves no legitimate adjudicatory need to preserve due process and would constitute a significant departure from current practice. Further, as noted, the record will necessarily already be complete by the time the case is referred to the Director, and there is no operational or legal reason why a respondent would need to brief the same case twice before a decision is issued. In all cases, including those referred to the Director, EOIR will continue to uphold due process.

The Department also disagrees with the commenters' statements that the Attorney General's certification powers are politically motivated or unaccountable to other branches of government. First, the Attorney General's certification powers are statutorily authorized. *See* INA 103(g)(2) (8 U.S.C. 1103(g)(2)). Second, as the head of the Department with responsibilities that include oversight of EOIR, *see* INA 103(g)(1) (8 U.S.C. 1103(g)(1)); 8 CFR 1003.0(a); 28 CFR 0.115, it is reasonable for the Attorney General to be authorized to conduct administrative review. Further, the statute clearly provides for judicial review in section 242 of the Act (8 U.S.C. 1252), which includes the review of decisions by the Attorney General, thus providing accountability. Section 242 of the Act reiterates the non-political nature of the Attorney General's certification power: by providing for judicial review, Congress holds the agency accountable for fairly and uniformly interpreting and administering immigration law, in line with EOIR's mission. Accordingly, the Department disagrees that the IFR's delegation of authority to the Director to review certain cases further exacerbates the alleged problem of the Attorney General's certification power.

*Comment:* Commenters expressed concern over the IFR's adverse effects on judicial independence. Commenters stated that the following provisions in the IFR undermine or



eliminate judicial independence: delegating authority from the BIA<sup>11</sup> to the Director to review cases, imposing allegedly arbitrary deadlines on immigration judges to decide cases, and creating OP to develop agency rules and policies, which commenters allege will effectively decide cases. Commenters stated that these provisions threaten the issuance of fair, impartial adjudications.<sup>12</sup>

Commenters were concerned that transferring delegated adjudicatory power from the BIA to the Director to review cases threatens independent interpretation of immigration law. One commenter explained that the IFR effectively made the Director the chief judge and principal counsel for the Department. Another commenter expressed concern that the BIA Chairman will face pressure to refer cases to the Director, regardless of the reasons for delay, because the Director maintains a supervisory role over the Chairman and directs the Chairman's work. Further, commenters alleged that the rule eliminates deliberative review of appeals, curtailing review to a minimum and undermining the authority of BIA members. One of the commenters, objecting to the IFR's provisions relating to the Director's ability to intervene when BIA decisions exceed the permissible timeline, argued that "decisions on complex appeals cases should not be rushed."

Several commenters also stated that the judicial independence of immigration judges was undermined by the Department's imposition of "arbitrary" deadlines for case processing. Those

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<sup>11</sup> Commenters also expressed concern over adverse effects from delegating authority from OGC to the Director to review cases. The Department notes, however, that the IFR did not make any such change. OGC has never had the authority to advise on or supervise legal activities related to specific adjudications, which means OGC has never had the authority to adjudicate specific cases. The IFR instead merely clarified OGC's authority to reflect its longstanding, current role in advising on specific categories of issues but not specific adjudications. 84 FR at 44539–40; *see* 8 CFR 1003.0(f). Following the IFR, OGC continues to be the chief legal counsel of EOIR for specified matters.

<sup>12</sup> Commenters stated that, in turn, delegating authority to the Director undermines the independence of career adjudicators, which may harm children who are seeking asylum or other humanitarian protection. However, as discussed above, the Director occupies a career position, and the transfer of adjudicatory authority to him in 2017 has not threatened adjudications or undermined authority in the assessment of R&A cases.

deadlines, commenters stated, prioritize speed over accuracy, justice, and careful consideration. One commenter stated that he was opposed overall to the Department's "attempts to weaken the independence of the immigration courts." Another commenter referenced "the clear Congressional message" that immigration judges "should not and cannot be subservient to the interests of an agency whose primary task is to expeditiously remove as many aliens as possible." Another commenter opposed the deadlines imposed on the BIA.

Commenters expressed concern over OP's influence on adjudicatory decisions. Specifically, commenters state that the office's development of rules, policies, guidance, and training would undermine immigration law and the abilities of immigration judges and BIA members to impartially adjudicate cases on a case-by-case basis. One commenter equated those rules, policies, guidance, and training to binding executive policy, and, relatedly, commenters stated that such provisions effectively allowed OP to decide cases. One commenter expressed concern that allowing OP to effectively decide cases erodes the separation between the executive and judicial branches of government.

Commenters expressed concern that the changes to 8 CFR 1003.0(c), which clarify that the INA, the regulations, or the Attorney General may delegate authority to the Director to adjudicate cases, in conjunction with the Director's authority at 8 CFR 1003.0(b)(2) to delegate authority to other EOIR employees, "dramatically expands the list of individuals who may adjudicate individual immigration cases."

One commenter stated that the IFR will result in arbitrary and unlawful restrictions on the meritorious claims of children seeking protection from harm. One organization stated that such restrictions would put children "at risk of unsafe return to their home country in violation of the [Trafficking Victims Protection Reauthorization Act]'s provision requiring the safe repatriation

of children.” Further, commenters stated that the IFR’s delegation of authority to the Director to intervene in BIA matters where the timeline for adjudication has been exceeded may undermine the independence of career adjudicators, thereby doing harm to the claims of children who are seeking asylum or other humanitarian protection.

*Response:* The Department disagrees that the IFR’s delegation of authority to the Director to adjudicate certain BIA cases that have exceeded the regulatory parameter for timeliness threatens judicial independence for several reasons.

First, the IFR did not affect the ultimate review scheme for EOIR proceedings. The BIA may review appeals of immigration judge decisions, such as a final decision in removal proceedings under section 240 of the Act (8 U.S.C. 1229a) if either party files an appeal that complies with the requisite procedures. 8 CFR 1003.1(b)(3); *see also* 8 CFR 1003.3, 1003.38. The Attorney General may review a case in accordance with 8 CFR 1003.1(h), and federal courts may review decisions in accordance with section 242 of the Act, 8 U.S.C. 1252. The IFR revised this process only by delegating the authority previously provided to the Attorney General to the Director to review certain cases before the BIA that have otherwise not been timely adjudicated, and to ensure that such cases the Director reviews are also subject to final review by the Attorney General in the same manner as all other BIA appeals. 8 CFR 1003.1(e)(8)(ii).

In addition, the new regulatory provision specifically provides that the Director exercises “authority . . . identical to that of the Board as described in this section,” such that the Director must exercise the same independent judgment required for BIA members under 8 CFR 1003.1(d)(1)(ii). Any decisions by the Director are also subject to statutes, regulations, and case law, and his decisions, like BIA decisions, are ultimately reviewable by the Attorney General and the federal courts. Accordingly, the IFR does not threaten the fairness and impartiality of

adjudications. Nevertheless, to address these concerns, the final rule makes changes to 8 CFR 1003.0(c) to provide in the regulations that the Director must exercise independent judgment and discretion when deciding cases. *See infra* Part III.

Because the IFR did not impose deadlines on immigration judges, comments that discussed immigration judge deadlines are not relevant to the rulemaking. Further, the IFR did not affect the BIA's timeline for deciding cases, which remains unchanged from the regulations pre-IFR.<sup>13</sup> *Compare* 8 CFR 1003.0(e)(8)(ii) (2018), *with* 8 CFR 1003.0(e)(8)(ii) (Aug. 26, 2019). The BIA continues to exercise independent judgment within the articulated timelines to decide cases in accordance with the "authorities under the Act and the regulations as is appropriate and necessary for the disposition of the case." 8 CFR 1003.1(d)(1)(ii). Thus, the IFR did not eliminate, curtail, or rush the BIA's review and consideration of cases, as commenters alleged.

The Department disagrees that the IFR will pressure the BIA Chairman or Vice Chairman to refer cases to the Director; instead, the IFR provided the specific circumstances in which decisions shall be referred. *See* 8 CFR 1003.1(e)(8)(ii).

While the IFR provided authority to OP regarding regulatory and policy development in 8 CFR 1003.0(e), regulations and agency policy do not effectively decide cases as commenters alleged. Immigration judges, the BIA, the Director, and the Attorney General continue to exercise independent judgment to interpret and apply the INA, regulations, and case law.

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<sup>13</sup> The Department reprinted the entire paragraph 1003.1(e)(8)(ii), including the BIA's timelines, rather than only the changed language to ensure clarity of the amendments made in the entire section for publication in the Federal Register and to provide for the reader the relevant context of the amended unit. *See Document Drafting Handbook*, Office of the Federal Register, at 3-37, [www.archives.gov/federal-register/write/handbook](http://www.archives.gov/federal-register/write/handbook) (last updated Aug. 9, 2019). The IFR did not change the BIA's timelines. *Compare* 8 CFR 1003.0(e)(8)(ii) (2018), *with* 8 CFR 1003.0(e)(8)(ii) (Aug. 26, 2019).

Regulations simply “implement, interpret, or prescribe” the INA but do not change the text of it. *See* 5 U.S.C. 551(4). Accordingly, even while implementing regulations interpreting the INA, OP does not decide cases or undermine the INA through its rulemaking authority.

The Department also notes that the IFR did not erode the separation between the executive and judicial branches of government because the judicial branch is not at issue—immigration courts are part of the executive branch within the Department, specifically EOIR. *See* 8 CFR pt. 1003, subpts. B, C.

Regarding concerns that the amendment to 8 CFR 1003.0(c), when read in conjunction with the Director’s delegation authority in 8 CFR 1003.0(b), expands the EOIR employees authorized to adjudicate cases, the Department intends for only the Director, not other EOIR employees, to have the authority to adjudicate BIA decisions that exceed the established timelines. Nevertheless, the Department recognizes the potential for confusion and unintended consequences. Accordingly, to address the concern, the Department is making a change in this final rule to clarify that the adjudicatory authority of the Director cannot be redelegated to another employee.

*Comment:* Commenters opposed the rule’s delegation of authority to the Director to issue precedential decisions. Many commenters alleged that the Director lacks expertise to issue precedential decisions. One commenter explained that “adjudication authority should only ever be given to experienced immigration legal professionals who understand the weight of precedent-setting decisions, and these decisions’ impacts on individual people’s lives.” Commenters stated that the Director’s role was meant to be one of office administration rather than one that exercised adjudicatory power. Further, commenters expressed specific opposition

to transferring cases from immigration judges and the BIA, who both possess adjudicatory authority, to someone serving in an office administrator role.

Commenters alleged that such delegation vests broad, improper adjudicatory authority in a single individual, the Director, and described the rule as an “extraordinary consolidation of powers in one individual who is not a judge and who is supposed to serve as an office administrator.” Several commenters expressed that the “stakes were too high” to give final adjudicatory power to one person and that such authority undermines the fairness and impartiality that should characterize adjudications. Commenters expressed concern that the rule threatens the integrity of the system, thus creating uncertainty for respondents.

*Response:* As discussed earlier in this preamble, the Director is a career appointee within the SES, chosen through a merit-based process, and the position of Director requires a significant amount of subject-matter expertise regarding immigration laws. The Director is charged with, *inter alia*, directing and supervising each EOIR component in the execution of its duties under the Act, which include adjudicating cases; evaluating the performance of the adjudicatory components and taking corrective action as necessary; providing for performance appraisals for adjudicators, including a process for reporting adjudications that reflect poor decisional quality; “[a]dminister[ing] an examination for newly-appointed immigration judges and Board members with respect to their familiarity with key principles of immigration law before they begin to adjudicate matters, and evaluat[ing] the temperament and skills of each new immigration judge or Board member within 2 years of appointment”; and “[p]rovid[ing] for comprehensive, continuing training and support for Board members, immigration judges, and EOIR staff in order to promote the quality and consistency of adjudications.” 8 CFR 1003.0(b)(1). Each of these responsibilities necessarily requires some manner of subject-matter expertise to carry out

effectively. Moreover, since January 2017, the Director has been responsible for administratively reviewing certain types of denials of reconsideration requests in R&A cases, with no noted complaints that such a delegation of authority is inconsistent with the role of the Director. As discussed in Part II.A of this preamble, the Director's role is not purely administrative and contains limited adjudicatory responsibilities consistent with the legal and subject-matter expertise required for the position.

The Department also disagrees that the IFR vested broad or improper adjudicatory authority in one person or that it can be characterized as an “extraordinary consolidation of power.”

First, the IFR delegated limited authority to the Director: “in exigent circumstances . . . in those cases where the panel is unable to issue a decision within the established time limits, as extended, the Chairman shall either assign the case to himself or a Vice Chairman for final decision within 14 days or shall refer the case to the Director for decision.” 8 CFR 1003.1(e)(8)(ii). The IFR replaced the Attorney General with the Director in 8 CFR 1003.1(e)(8)(ii) and merely delegated authority previously left with the Attorney General to the Director, subject to possible further review by the Attorney General. The Director may only adjudicate cases that have surpassed the articulated deadlines and that have not been assigned to the Chairman or a Vice Chairman for final adjudication. Clearly, the Director's scope of review is limited to only a narrow subset of EOIR cases.

Second, the INA authorizes such delegation. The propriety of the delegation is clear in section 103(g)(2) of the Act (8 U.S.C. 1103(g)(2)), which provides that “the Attorney General shall . . . delegate such authority[] and perform such other acts as the Attorney General

determines to be necessary for carrying out [INA 103 (8 U.S.C. 1103)],” and is discussed further throughout Part II.C.4.a of this preamble.

Third, the Attorney General retains authority to review the Director’s decisions, and judicial review continues to be available for administratively final decisions, in accordance with the statute. *See* 8 CFR 1003.1(e)(8)(ii); INA 242 (8 U.S.C. 1252). Thus, the IFR did not vest “final” authority in the Director, negating concerns that the IFR eliminated integrity and impartiality in the immigration system.

b. Political concerns

*Comment:* Commenters expressed concern that the Director’s decisions may be heavily influenced by the political climate or the “President’s anti-immigrant agenda.” Commenters expressed specific concern over the political nature of the Director’s role and its effect on fair adjudications. Commenters stated that the Director is a “political appointee who is an administrator, not a judge.”<sup>14</sup> Other commenters opposed the rule’s delegation because the Director would act alone in issuing decisions, which they stated was “problematic both for the visual it creates of an unjust system and for the very real possibility of a policy maker—the Director of EOIR—utilizing the power to adjudicate claims to effectuate policy.” Another commenter echoed this sentiment, stating that delegating authority to an individual reporting to a political appointee creates the appearance of impropriety that undermines the immigration court system.

*Response:* The Department rejects the notion, and subsequent implications, that the Director acts in a political capacity. As previously stated, the Director is a career appointee of

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<sup>14</sup> For further discussion on comments addressing the effect of political influence on the Director, see the discussion in Part II.A of this preamble.



the SES, not a political appointee. The Department also notes that SES positions are specifically designed to “provide for an executive system which is guided by the public interest and free from improper political interference.” 5 U.S.C. 3131(13).

Accordingly, the Director does not encumber a political position, nor does the Director act in a political capacity. The Director, like members of the BIA, exercises independent judgment and discretion in accordance with the statutes and regulations to decide any case before him for decision pursuant to 8 CFR 1003.1(e)(8)(ii) due to the BIA’s failure in that case to meet the established timelines. *See id.* (“[T]he Director shall exercise delegated authority from the Attorney General identical to that of the Board[.]”); *cf.* 8 CFR 1003.1(d)(1)(ii) (“Board members shall exercise their independent judgment and discretion in considering and determining the cases coming before the Board[.]”). EOIR’s mission remains the same—to adjudicate cases in a fair, expeditious, and uniform manner. *See About the Office, supra*. The Director does not act outside of that mission or the governing statutes and regulations of EOIR.

Further, the Director’s decisions are subject to review by the Attorney General, either at the Director’s or Attorney General’s request. 8 CFR 1003.1(e)(8)(ii). The Department disagrees with the commenter’s concern regarding a politically appointed Attorney General’s delegation of power to the Director creating the appearance of impropriety. Congress has specifically provided the Attorney General, a presidential appointee, with broad powers regarding the immigration laws, and the statute explicitly allows for the Attorney General to delegate that power. INA 103(g)(2) (8 U.S.C. 1103(g)(2)). Concerns about this allocation of authority are best addressed to Congress.

## 5. *Office of the General Counsel*

*Comment:* The Department received several comments opposed to the rule's transfer of functions from OGC. Several commenters stated their opposition to the limitations placed on the functions and authority of OGC.<sup>15</sup>

*Response:* The Department appreciates the commenters' concerns. However, the Department believes that the transfer of certain OGC functions to OP was reasoned and appropriate.

As discussed above, the Director has the authority to "propose the establishment, transfer, reorganization or termination of major functions within his organizational unit as he may deem necessary or appropriate." 28 CFR 0.190(a). The Attorney General, as the head of the Department, supervises and directs the administration of EOIR. 28 U.S.C. 503, 509, 510.

As reflected in the IFR, the Attorney General created OP to "improve[ ] efficiency by reducing redundant activities performed by multiple components and ensure[ ] consistency and coordination of legal and policy activities across multiple components within EOIR." 84 FR at 44538. As a result, the rule transferred OGC functions that were policymaking in nature, namely regulatory development and review, from OGC into OP. *Id.*; see 8 CFR 1003.0(e)(1). It is the Department's judgment that including these policymaking functions in OP, and not in OGC or elsewhere in EOIR, is necessary for OP to be able to meet its mission and increase EOIR's efficiencies. Further, having policymaking functions within OGC is not fully congruent with

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<sup>15</sup> Other commenters averred that the delegation of OGC's responsibilities to the Director was unlawful. Commenters noted that the rule delegated decision-making authority to the Director on various matters previously handled by OGC; however, the commenters did not identify to which "various matters" they refer. Because the IFR did not delegate any authority or decision-making role from OGC to the Director, and did not alter the Director's supervisory authority over OGC, the Department does not discuss these concerns further in this final rule.

OGC's role of providing legal counsel to all of EOIR, including the three adjudicatory components.

The IFR, however, did not otherwise limit the function or authority of OGC, which continues to perform a wide range of important roles for EOIR, including those related to employee discipline, ethics, anti-fraud efforts, practitioner discipline, privacy, Freedom of Information Act requests, records management, and litigation support. *See* 8 CFR 1003.0(f); *see also Office of the General Counsel, supra*. The IFR will ensure that OGC is able to devote sufficient resources to all of the programs for which it is responsible, particularly given the increased complexity and volume of its work in recent years. *See* 84 FR at 44538.

#### 6. *Policy Considerations*

##### a. Political motivations

*Comment:* Many commenters alleged that the rule is specifically purposed to advance a political agenda and politicize immigration adjudications. Commenters oppose the rule's transfer of cases to an alleged political appointee and the rule's empowerment of an allegedly politically controlled Office of Policy because those provisions allow political forces to influence and govern adjudications.

Some commenters alleged that OP was specifically created to advance an anti-immigrant political agenda through regulations and guidance. Accordingly, some commenters oppose the rule's moving of OLAP to OP as counterintuitive because OLAP works to expand legal access through the R&A Program, NQRP, and LOP, among others.

One commenter alleged that through the rule, the Director is attempting to rewrite immigration law to conform to particular political motives. Another commenter remarked that the "delegation of judicial power to the unqualified Executive Director further stands at odds

with the nomenclature change that outwardly enhances the esteem of the BIA. . . . These inconsistencies illustrate the arbitrary nature of the interim changes as a whole, and suggest ulterior motives.”

*Response:* As discussed above, all EOIR officials are career federal employees, not political appointees appointed for a particular presidential administration. Both the Director and the Assistant Director for Policy, as well as many other EOIR leadership positions, are members of the SES who occupy career appointments. Career SES officials serve as high-level managers in the federal government and work to further the public interest without political motivations. *See* 5 U.S.C. 3131(13).

As employees of the Department, however, all EOIR officials are subject to the supervision of the Attorney General, who is a political appointee of the President. *See* INA 103(g) (8 U.S.C. 1103(g)); 28 U.S.C. 503; *see also* 8 CFR 1003.0(a) (providing that EOIR is within the Department); 28 CFR 0.1 (same), 0.5(a) (providing that the Attorney General shall “[s]upervise and direct the administration and operation of the Department of Justice”). The promulgation of this rule did not have any impact on the Attorney General’s role as the ultimate supervisor of EOIR. *Cf. Matter of Castro-Tum*, 27 I&N Dec. 271, 281 (A.G. 2018) (discussing the Attorney General’s “well-established” authority regarding the immigration laws).

As stated in the IFR, OP was established “to assist in effectuating authorities given to the Director in 8 CFR 1003.0(b)(1), including the authority to, *inter alia*, issue operational instructions and policy, administratively coordinate with other agencies, and provide for training to promote quality and consistency in adjudications.” 84 FR at 44538.

Further, the Department chose to locate OLAP within OP due to “OLAP’s role in effectuating EOIR’s Nationwide Policy regarding procedural protections for detained aliens who

may be deemed incompetent” and to “ensure[] an appropriate chain of command and better management of OLAP’s programs, provide[] for better coordination of OLAP’s functions within the broader scope of EOIR’s adjudicatory operations, and allow[] for greater flexibility in the future regarding OLAP’s mission.” 84 FR at 44539. The Department continues to believe that OLAP is well-suited for placement in OP for these same reasons.

b. Justification for the rule

*Comment:* Several commenters stated that the IFR “lacks reasonable justification.”<sup>16</sup> Commenters compared the IFR to EOIR’s alleged “similar plan to eliminate OLAP’s legal orientation programs in spring of 2018” and averred that both the rule and the previous plan lacked reasonable justification. Commenters did not provide further discussion regarding their claim that the rule lacks reasonable justification.

*Response:* The Department continues to rely on the reasons articulated in the IFR. *See* 84 FR at 44538–40. All changes in the IFR were designed to further EOIR’s mission.

c. Nation’s core values

*Comment:* Commenters expressed opposition to the IFR, alleging that it undermines the immigration system, which, in turn, contradicts the Nation’s core democratic principles of fair process, justice, access to legal representation, and rule of law. Commenters emphasized human dignity and expressed concern that the IFR adversely affects the Nation’s system of laws and human lives. Commenters also stated that the IFR contradicts the nation’s Christian and immigrant history.

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<sup>16</sup> Comments in this Part are distinguishable from comments described in Part II.D.2 of this preamble. Those comments alleged that the rule’s arbitrary and capricious nature violates the Administrative Procedure Act (“APA”). These comments, however, do not mention the APA; rather, they briefly note that the rule “lacks any reasonable justification” but do not elaborate further.

*Response:* The Department recognizes that the United States government upholds certain core principles that are fundamentally and distinctly American, and the Department asserts that the IFR strengthens, not weakens, the Nation's immigration court system, and is thus aligned with America's core values. The IFR was designed to promote EOIR's primary mission of fairly, expeditiously, and uniformly interpreting and administering the Nation's immigration laws. For example, the IFR was designed to promote a more efficient disposition of cases at the administrative appeals level. 84 FR at 44539–40. Additionally, the IFR formalized the establishment of an Office of Policy, which is designed to improve efficiency by reducing redundancy within the agency and promoting consistent policy positions throughout EOIR. *Id.* at 44538. The rule also restructures EOIR by placing OLAP's duties under OP to ensure better management and facilitation of OLAP's programs within the bounds of relevant statutes and regulations. *Id.* at 44539.

d. Efficiency concerns

*Comment:* Numerous commenters stated that permitting the Director to adjudicate cases will not meaningfully address concerns about timely case adjudication. Commenters indicated that in allowing the Director to adjudicate pending cases before the BIA, the IFR did not address the root cause of the pending caseload before the BIA or attempt to increase the BIA's efficiency. One commenter stated that the Director would not have the time to adjudicate all BIA cases pending beyond the 90-day or 180-day adjudication deadlines and would therefore have to select which cases to adjudicate, thereby allowing the Director to interfere with the impartial BIA adjudication process. One commenter was concerned that delegating authority to adjudicate immigration cases would decrease the efficiency of the immigration system and degrade the public trust in the process.

*Response:* The Department has already undertaken several efficiency-focused initiatives for the BIA. *See, e.g., Policy Memorandum 20-01: Case Processing at the Board of Immigration Appeals, supra* (explaining various agency initiatives, including an improved BIA case management system, issuance of performance reports, and a reiteration of EOIR’s responsibility to timely and efficiently decide cases in serving the national interest).

Addressing the root causes of the pending caseload is beyond the scope of this rulemaking; the IFR did not purport to solve every inefficiency or issue affecting timely case adjudications within the agency. Instead, the IFR is a tool that addresses one inefficiency that relates to particular case adjudications, as outlined in 8 CFR 1003.1(e)(8)(ii), by delegating authority to the Director to decide such cases.

The Department notes that attorneys and other staff at the BIA routinely assist Board members with research and analysis of cases pending before the BIA. The Director’s handling of the subset of cases defined in this rule does not change the role of those staff to assist in such a manner. The Director, as the supervisor of all of EOIR, may seek assistance from such staff as well. Further, the Director has counsel from whom he may seek assistance within OOD. The Department is confident in the abilities of the Director and the BIA to timely adjudicate such cases in accordance with the regulations and statutes and, thus, disagrees with commenters’ assertions that the Director lacks the time or capacity to fulfill this responsibility. This rule does not impose a requirement that the Director handle the cases, but provides for that possibility when needed and when it is reasonable and practicable for him to do so. Further, the Department has determined that, given other responsibilities and obligations, “the Attorney General is not in a position to adjudicate any BIA appeal simply because it has exceeded its time limit for adjudication.” 84 FR at 44539. Accordingly, the Department believes that the delegation of the

Attorney General's authority over these cases to the Director increases efficiency within the agency and serves the national interest. Cf. Jefferson B. Sessions III, Attorney General, U.S. Dep't of Justice, *Memorandum for the Executive Office for Immigration Review: Renewing Our Commitment to the Timely and Efficient Adjudication of Immigration Cases to Serve the National Interest* (Dec. 5, 2017), <https://www.justice.gov/opa/press-release/file/1015996/download>.

e. Alternative recommendations

*Comment:* Commenters stated that the IFR does not adequately address workload concerns at the BIA or the immigration courts. Several commenters stated that permitting the Director to adjudicate cases that have been pending before the BIA for more than 90 days is an inappropriate response to the workload issues currently affecting the BIA. Several commenters indicated that immigration law requires the expertise of an immigration judge; thus, commenters stated that hiring more immigration judges could address concerns regarding case processing times. One commenter also stated that the Department should hire more immigration judges rather than undermine the authority of the current immigration judges. Commenters proposed alternative solutions to address case processing times such as initiatives to improve staff retention, recalling senior judges or retired BIA members for temporary assignment to the BIA, and generally equipping the BIA with the resources necessary to adjudicate decisions in a timely manner.

*Response:* The Department appreciates the commenters' suggestions, though many of them—e.g., hiring more immigration judges, recalling retired immigration judges or Board members—are beyond the scope of the IFR. The Department believes that the IFR will contribute to a better functioning immigration court system.



Further, the Department notes that the IFR was just one of many affirmative efforts to improve EOIR's efficiencies, including the immigration courts and the BIA, and it was not intended to foreclose alternative methods. For example, the Department has prioritized immigration judge hiring in recent years, increasing the number of immigration judges from 245 in 2010 to 466 through the first quarter of 2020. *See* EOIR, U.S. Dep't of Justice, *EOIR Adjudication Statistics: Immigration Judge (IJ) Hiring* (Jan. 2020), <https://www.justice.gov/eoir/page/file/1104846/download>. In 2018, the Department also increased the number of appellate immigration judges authorized to serve on the BIA from 17 to 21, *see* Expanding the Size of the Board of Immigration Appeals, 83 FR 8321 (Feb. 27, 2018), and recently increased it again to 23, *see* Expanding the Size of the Board of Immigration Appeals, 85 FR 18105 (Apr. 1, 2020). In addition, EOIR is working towards a pilot electronic system for filing and case management. *See* EOIR Electronic Filing Pilot Program, 83 FR 29575 (June 25, 2018). EOIR has taken steps to ensure that courtrooms are not being underutilized around the country during business hours. EOIR, U.S. Dep't of Justice, *Policy Memorandum 19-11: No Dark Courtrooms* (Mar. 29, 2019), <https://www.justice.gov/eoir/file/1149286/download> (intended to memorialize policies to reduce and minimize the impact of unused courtrooms and docket time). As previously explained by the Director, "[e]ach of these accomplishments is critical to EOIR's continued success as it addresses the pending caseload, and EOIR has solved some of its most intractable problems of the past decade regarding hiring, productivity, and technology." *Unprecedented Migration at the U.S. Southern Border: The Year in Review: Hearing Before the S. Comm. on Homeland Sec. & Governmental Affs.*, 116th Cong. (2019) (statement of James McHenry, Director, EOIR, U.S. Dep't of Justice).

*Comment:* One commenter recommended that immigration courts be made into Article I courts.<sup>17</sup> The commenter did not provide further reasoning for the recommendation.

*Response:* The recommendation is both beyond the scope of this rulemaking and the authority of the Department of Justice.

Congress has the sole authority to create an Article I court. *Cf., e.g.,* 26 U.S.C. 7441 (“There is hereby established, under Article I of the Constitution of the United States, a court of record to be known as the United States Tax Court.”). Despite this authority, Congress has provided for a system of administrative hearings for immigration cases, which the Department believes should be maintained. *See* INA 240 (8 U.S.C. 1229a) (laying out administrative procedures for removal proceedings); *see also Strengthening and Reforming America’s Immigration Court System: Hearing Before the Subcomm. on Border Sec. & Immigration of the S. Comm. on the Judiciary*, 115th Cong. (2018) (written response to Questions for the Record of James McHenry, Director, EOIR, U.S. Dep’t of Justice) (“The financial costs and logistical hurdles to implementing an Article I immigration court system would be monumental and would likely delay pending cases even further.”).

#### D. Comments Regarding Regulatory Requirements: Administrative Procedure Act

##### *1. Notice-and-Comment Requirements*

*Comment:* Many commenters raised concerns that the IFR violated the Administrative Procedure Act (“APA”) by failing to provide a prior notice-and-comment period. *See* 5 U.S.C.

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<sup>17</sup> In fact, the commenter recommended that immigration courts be made into Article II courts, but the Department believes that the commenter inadvertently meant to refer to Article I courts due to recent discussions on the issue, and responds accordingly. *See Strengthening and Reforming America’s Immigration Court System, Hearing Before the H. Subcomm. on Border and Immigration Issues of the H. Comm. on the Judiciary*, 115th Cong. (Apr. 18, 2018), <https://www.judiciary.senate.gov/meetings/strengthening-and-reforming-americas-immigration-court-system> (exploring ways in which Congress can strengthen and reform the immigration court system, including the option to reform the system into Article I courts).

553. Several commenters stated that the rule should not have been exempt from the traditional notice-and-comment requirement and the rule included considerable substantive changes that will have a fundamental impact on EOIR's legal access programs. In making this argument, several commenters argued that the placement of OLAP's functions under OP constituted or took a step toward the elimination of those program functions.<sup>18</sup> One commenter indicated that the IFR's placement of OLAP under OP was particularly significant because OP "is responsible for attacks on due process for immigrants" and, with such a design, the rule constituted much more than an agency reorganization, rather than a mere "rule of management and personnel" or agency procedure and practice. Commenters alleged that because OLAP's programs impact thousands of accredited representatives and hundreds of non-profits who employ them, the IFR constituted an adverse impact on the public that required a period of notice-and-comment.

Some commenters argued that, because OLAP was created in direct response to a 2016 rule to administer the R&A Program, the changes to OLAP in the IFR should have been subject to the APA's notice-and-comment requirements.<sup>19</sup> Some commenters argued that the IFR improperly overturned the 2016 rule, which was properly implemented through notice and comment.

Commenters stated that there was not an "urgent" need to publish the IFR quickly and that the IFR enacted major changes to EOIR's adjudicatory system, thereby requiring EOIR to follow the notice-and-comment process.

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<sup>18</sup> See Part II.C.2.a of this preamble for further discussion.

<sup>19</sup> The Department understands these commenters to refer to OLAP's role in the R&A process, not OLAP as an individual office within EOIR. The 2016 regulation did not first establish OLAP. Instead, the 2016 regulation "formalize[d] OLAP's structure and function as a component of EOIR and transfer[red] the administration of the R&A program from the Board to OLAP." 80 FR at 59516.

Many of these commenters argued that the IFR's provisions regarding the delegation of authority from the Attorney General to the Director and from the Director to the Assistant Director for Policy demonstrated that the IFR made substantive changes that went beyond just reorganization and, thereby, required a period of notice and comment. Several commenters stated that the role of the Director is purely administrative, limited by the provisions of 8 CFR 1003.0, and that the IFR's provisions for the Director's intervention on BIA rulings when adjudication exceeds certain timelines amounted to significant substantive, not merely procedural, changes mandating a notice-and-comment period.

One commenter stated that implementation of the IFR without the provision of a notice-and-comment period undermined the APA's values, such as accuracy, efficiency, and acceptability.

One commenter said that the Department's characterization of the IFR's substance, which the commenter alleged was described as "minor administrative housekeeping," was disingenuous and a deliberate effort to evade the APA's notice-and-comment requirements. Relatedly, another commenter asserted that the Department's imposition of the rule, without permitting a period for notice and comment, was "both illegal and ill-conceived."

*Response:* The Department disagrees with commenters that the IFR involved changes that required a notice-and-comment period or a 30-day delay in the effective date. As the Department explained in the IFR, it was not subject to the notice-and-comment process or a delay in effective date because it was "a rule of management or personnel as well as a rule of agency organization, procedure, or practice." 84 FR at 44540; *see* 5 U.S.C. 553(a)(2), (b)(A).

Contrary to commenters' assertions that the substantive nature of the IFR triggered a required notice-and-comment period (as opposed to the procedural nature), the APA does not

condition notice-and-comment requirements purely on whether a rulemaking is substantive in nature. Instead, the APA's notice-and-comment procedures are subject to various enumerated exceptions. Such exceptions include rulemaking related to "agency management or personnel" and "rules of agency organization, procedure, or practice." *See* 5 U.S.C. 553(a)(2), (b)(A).

First, transferring OLAP and its programs to OP is a matter of agency management or personnel, as well as a rule of agency organization, procedure, or practice, such that notice-and-comment is unnecessary. *See* 5 U.S.C. 553(a)(2), (b)(A). In fact, OLAP has been moved multiple times within EOIR throughout its history, *see* 84 FR at 44537, and none of those moves were effected through notice-and-comment rulemaking. The IFR did not eliminate OLAP or otherwise change its programs except the immediate supervisor who oversees the office. *See supra* Part II.C.2.a. Further, the IFR did not change OLAP's significant role and operations within the agency or the necessary oversight of its projects and programs; it only transferred OLAP to a new component, OP, from OOD.

In addition, the Department disagrees that OP's actions undermine due process or that its creation was a product of anything further than agency management, personnel, and organization. *See supra* Part II.C.3.c, d. Accordingly, the public was not and will not be adversely affected by the IFR's internal reorganization and transfer of OLAP into OP and need not be given notice and an opportunity to comment. *See* 5 U.S.C. 553(a)(2), (b)(A).

The Department disagrees with commenters' assertions that the provisions in the IFR that delegated authority to the Director to review otherwise untimely BIA decisions were substantive changes that should have undergone notice-and-comment procedures. Instead, the Attorney General's delegation of authority to the Director to review cases under 8 CFR 1003.1(e)(8)(ii) furthers the Director's ability to exercise oversight and effective management of EOIR, and it

improves agency organization, procedure, and practice in order to uphold EOIR's mission to interpret and administer the Nation's immigration laws. As explained by the IFR, an internal delegation of administrative authority does not adversely affect members of the public and involves an agency management decision that is exempt from the notice-and-comment rulemaking procedures of the APA. 84 FR at 44540. As such, the IFR is exempt from the APA's notice-and-comment requirements, and the Department appropriately published it as an IFR.

The general regulations that outline the Director's authority are contained in 8 CFR 1003.0(b) and were not substantively affected by the IFR.<sup>20</sup> Specifically, the regulations provide that the "Director shall manage EOIR and its employees." 8 CFR 1003.0(b)(1). The enumerated list that follows in paragraphs (b)(1)(i)–(ix) explains how the Director may accomplish the directive provided in paragraph (b)(1). For example, the Director may "[i]ssue operational instructions and policy, including procedural instructions," "[d]irect the conduct of all EOIR employees to ensure the efficient disposition of all pending cases," and "manage the docket of matters to be decided by the Board, the immigration judges, the Chief Administrative Hearing Officer, or the administrative law judges." *Id.* 1003.1(b)(1)(i), (ii). Given the breadth of the Director's responsibilities, the Attorney General also authorized the Director to "exercise other such authorities as the Attorney General may provide." *Id.* 1003.0(b)(1)(ix).

Before the IFR's publication, § 1003.0(c) in turn provided that the Director had no authority to adjudicate cases arising under the Act or regulations and could not direct the result

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<sup>20</sup> The only change the IFR made to 8 CFR 1003.1(b)(1)(i)–(ix) was to include the Department of Health and Human Services ("HHS"), which has responsibility to provide care and other services for unaccompanied alien children ("UAC"), in the list of federal agencies with which EOIR may administratively coordinate. 84 FR at 44540 n.4; *see* 8 CFR 1003.0(b)(1)(iii); *cf.* 45 CFR pt. 410 (HHS regulations governing care and placement of UAC).

of an adjudication assigned to the Board, an immigration judge, the Chief Administrative Hearing Officer, or an Administrative Law Judge, although this prohibition was not to be construed to limit the authority of the Director under 8 CFR 1003.0(b). 8 CFR 1003.0(c) (2018). Accordingly, the authority conferred by paragraph (b)(1)(ix) on the Director to exercise other authority provided by the Attorney General was not affected by paragraph (c)'s limitation on the Director's adjudicatory authority.<sup>21</sup>

At the same time, the INA confers power on the Attorney General to review administrative determinations. INA 103(g)(2) (8 U.S.C. 1103(g)(2)). Prior to the IFR, when a case appeal surpassed the regulatory timeline, the Chairman assigned the case to himself, a Vice Chairman, or the Attorney General. 8 CFR 1003.1(e)(8)(ii) (2018). This procedure continues to be in place following the IFR. However, as a matter of agency management, as well as organization, procedure, or practice, the Attorney General delegated that authority to review administrative determinations to the Director. In his discretion, the Attorney General determined that the Director's oversight and management responsibilities, particularly in regards to case processing at the BIA, were best effectuated by authorizing the Director to adjudicate appeals when a "panel is unable to issue a decision within the established time limits, as extended." *Id.* 1003.1(e)(8)(ii). Authorizing the Director to decide otherwise untimely cases allows him to best fulfill his oversight and management responsibilities of the agency, which includes the BIA. *See id.* 1003.0(b).

Regarding commenters who alleged there was not an "urgent" need to publish the IFR without notice-and-comment, the Department notes that it did not issue the rule as an IFR based

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<sup>21</sup> See Part II.C.4.a of this preamble for further discussion regarding the propriety of the Attorney General's delegation of power to the Director to adjudicate cases.

on urgency; rather, the Department issued the rule as an IFR because it involved agency management or personnel, as well as agency organization, procedure, or practice. *See* 84 FR at 44540. As explained above, such rulemakings do not require a notice-and-comment period. 5 U.S.C. 553(a)(2), (b)(A).

Finally, the Department disagrees that publication of the rule as an IFR undermined values of the APA process. Congress specifically provided exceptions to the general notice-and-comment procedures for matters involving agency personnel or management because such procedures are unnecessary to further the APA's purpose. *See* S. Rep. No. 79-752, at 13 (1945) (explaining that the exception for proprietary matters was "included because the principal considerations in most such cases relate to mechanics and interpretations or policy, and it is deemed wise to encourage and facilitate the issuance of rules by dispensing with all mandatory procedural requirements").

The Department's publication of the rule as an IFR aligns with the Senate Committee's explanation of the exception at issue—while the Department was not required to use notice-and-comment rulemaking procedures, it chose, in an exercise of discretion, to issue the rule as an IFR to provide the public with information. For example, the IFR provided the public with information about OLAP's transfer because OLAP maintains many public-facing programs and contracts. Because the organizational change could impact letterhead or signage, with which the public interacts, the agency sought to reduce possible confusion.

Finally, the Department notes that although the IFR was published as an IFR and not a proposed rule, the IFR contained a 60-day comment period that was not required. The Department has carefully reviewed all comments received and appreciates the public's responses.



## *2. Arbitrary and Capricious*

*Comment:* Several commenters stated that the rule's publication constituted an arbitrary and capricious attempt by the Department to impose substantive policy changes impacting the immigration adjudicatory process.

Other commenters stated that the rule's provision allowing for the Director's involvement when BIA adjudication exceeds the permissible timeline constitutes an impermissible, arbitrary reassignment of the BIA's authority to an administrator, not a judge. One commenter argued that the rule's timeline permitting intervention by the Director in BIA decisions amounted to creation of an "arbitrary deadline," which would force judges to place speed over justice and violate due process requirements.

Several commenters argued that the IFR is arbitrary and capricious because the transfer of R&A Program oversight from OLAP to OP amounted to "dismantling programs" that are required by regulation, statute, and court order. Some commenters observed that the IFR's notice did not include sufficient information to anticipate the practical effects of changes created by the IFR, including possible changes to immigrants' access to counsel.

*Response:* The Department disagrees with commenters that the IFR's changes to title 8 and title 28, CFR, are arbitrary and capricious. *See* 5 U.S.C. 706(2)(A). An agency's decision is arbitrary and capricious if the agency did not conduct a consideration of the relevant factors and made a clear error of judgment. *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971). As evidenced in the IFR, the Department considered the relevant factors and concluded that the changes to EOIR's organization and adjudication process were necessary to increase efficiency and properly allocate resources. *See, e.g.*, 84 FR at 44538–40. As explained in Part II.D.1 of this preamble, the IFR set forth non-substantive changes regarding agency

management or personnel, as well as agency organization, procedure, or practice, and it was not subject to notice-and-comment requirements. *See Id.* at 44540; *see also* 5 U.S.C. 553(a)(2), (b)(A).

Specifically, the Department does not believe that it was arbitrary and capricious for the Attorney General to delegate his authority to the Director to adjudicate appeals that have exceeded the BIA's adjudication times. This delegation of authority is one of many actions that the Department is taking to address the pending caseload of appeals at the Board. The Attorney General has already codified regulations recognizing that the Attorney General may delegate duties to the Director in addition to those outlined in existing regulations. *See* 8 CFR 1003.0(b)(1)(ix) (providing that the Director may exercise "other authorities as the Attorney General may provide"). Here, the Attorney General has reasonably concluded that it is necessary and appropriate to assign certain pending case appeals to the Director for adjudication for the purpose of improving efficiency in adjudications. *See* 84 FR at 44539–40.

The Department disagrees that this delegation of authority sets arbitrary deadlines. In fact, the IFR did not affect any BIA case-processing timelines. Instead, the timelines provided in EOIR's regulations for BIA case appeal adjudications were first established in 2002. *See* Board of Immigration Appeals: Procedural Reforms To Improve Case Management, 67 FR 54878, 54896 (Aug. 26, 2002) (codified at 8 CFR 3.1(e)(8) (2002)).<sup>22</sup> As part of this rulemaking, the Department revised 8 CFR 1003.1(e)(8)(ii), which generally required the Chairman to re-assign pending BIA cases that have surpassed the imposed deadlines to himself, a Vice-Chairman, or

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<sup>22</sup> Following the creation of DHS in 2003 after the passage of the HSA, EOIR's regulations were moved from chapter I of title 8, CFR, to chapter V. Aliens and Nationality; Homeland Security; Reorganization of Regulations, 68 FR 9824 (Feb. 28, 2003). Part 3 was duplicated for EOIR at part 1003.

the Attorney General. *See* 8 CFR 1003.1(e)(8)(ii) (2018) The Department is unaware of any existing case law finding the deadlines imposed were arbitrary and capricious. *Cf., e.g., Purveegiin v. Gonzales*, 448 F.3d 684, 691 (3d Cir. 2006) (citing 8 CFR 1003.1(e)(8) as an example of a regulation that was “merely an ‘internal management directive’”).

Finally, the Department disagrees that the IFR was arbitrary and capricious because it “dismantled” the R&A Program. The IFR was “not intended to change—and [did] not have the effect of changing—any of OLAP’s current functions.” 84 FR at 44539. Moreover, the rule plainly required OP to “maintain a division within the Office of Policy to develop and administer a program to recognize organizations and accredit representatives to provide representation before [EOIR and/or DHS].” 8 CFR 1003.0(e)(3). As explained above, the IFR merely moved oversight of the R&A Program from one non-adjudicatory component of EOIR, OOD, to another, OP. The R&A Program and OLAP’s other programs continue to operate under OLAP’s new leadership structure, demonstrating the Department’s consideration of the practical effects of the rule, including aliens’ access to counsel, as it relates to this point. Further, because the rule merely restructures EOIR, the practical effects to individual aliens is minimal at best.

### **III. Provisions of the Final Rule**

The Department has considered and responded to the comments received in response to the IFR. In accordance with the authorities discussed in Part I.B of this preamble, the Department is now issuing a final rule that adopts the provisions of the IFR as final with some amendments to 8 CFR 1003.0(b)(2) and (c), regarding the Director’s adjudicatory authority and ability to delegate that authority, 8 CFR 1292.6, regarding the Director’s interpretive authority in R&A cases, and 8 CFR 1292.18(a), also regarding the Director’s ability to delegate his authority. Taken together, these changes address commenters’ concerns that the IFR’s changes allowed the

Director to delegate authority to adjudicate cases arising under the Act or the regulations to the Assistant Director of Policy or to any other EOIR employee, and that the Director's decisions when adjudicating untimely BIA appeals could be subject to improper influence. The Department did not intend for the IFR to have either of those effects; therefore, it amends the regulatory text in the following ways.

First, in 8 CFR 1003.0(b)(2), the final rule designates the current text in the paragraph, which sets out the Director's general delegation authority, as paragraph 8 CFR 1003.0(b)(2)(i). It then adds new paragraph 8 CFR 1003.0(b)(2)(ii), which provides an exception to the Director's delegation authority. These changes instruct that the Director may generally delegate authority given to him by 8 CFR part 1003 or directly by the Attorney General to "the Deputy Director, the Chairman of the Board of Immigration Appeals, the Chief Immigration Judge, the Chief Administrative Hearing Officer, the Assistant Director for Policy, the General Counsel, or any other EOIR employee," but that the Director may not further delegate the case adjudication authority provided by 8 CFR 1003.1(e)(8)(ii) (regarding the adjudication of BIA cases that exceed the established adjudication timelines), 8 CFR 1292.18 (regarding the Director's discretionary authority to review requests for reconsideration of denials of applications for recognition or accreditation), or any other provision or direction unless expressly authorized to do so.

The final rule adds language to 8 CFR 1003.0(c) providing guidelines that would apply whenever the Director is authorized by statute, regulation, or delegation of authority from the Attorney General or when acting as the Attorney General's designee. During such adjudications, the final rule specifically instructs the Director to "exercise independent judgment and discretion." As discussed above, the Director is a member of the career SES, not a political

appointee, who has a demonstrated a knowledge of immigration law and procedure. The final rule enhances the assurance of independent judgment, and not political motivation, regarding the decisions the agency's adjudicators make, such as those authorized by regulation at 8 CFR 1003.1(e)(8)(ii) and 1292.18.

In addition, the final rule authorizes the Director to "take any action consistent with the Director's authority as is appropriate and necessary for the disposition of the case." For example, under 8 CFR 1003.0(b)(1)(ii), the Director has authority to "[d]irect the conduct of all EOIR employees to ensure the efficient disposition of all pending cases." The final rule makes explicit that this and other powers of the Director also apply whenever the Director is authorized to adjudicate a case.

The final rule also clarifies 8 CFR 1292.6 to state that both the Assistant Director for Policy (or the Assistant Director for Policy's delegate) and the Director are responsible for interpreting 8 CFR 1292.11 through 1292.20 when adjudicating R&A cases. This clarification eliminates any suggestion that only the Assistant Director for Policy (or the Assistant Director for Policy's delegate) can interpret 8 CFR 1292.11 through 1292.20, which would be in tension with the Director's administrative review authority in 8 CFR 1292.18.

Finally, consistent with the limitation, in response to a commenter's concern, on the Director's ability to re-delegate the Director's adjudicatory authority, the final rule makes a conforming change to 8 CFR 1292.18 by removing the Director's authority to delegate the discretionary authority to review requests for reconsideration of denials of applications for recognition or accreditation to "any officer within EOIR, except the Assistant Director for Policy (or the Assistant Director for Policy's delegate)." This provision was initially included in the regulations in 2016 without discussion as to the need of the Director to be able to delegate these

cases. *See* 81 FR at 92356–57, 92372. The final rule, thus, ensures that the limit on the Director’s authority to re-delegate that position’s adjudicatory authorities is consistent across the regulations.

#### **IV. Regulatory Review Requirements**

##### *A. Administrative Procedure Act*

As previously explained by the Department and discussed further in Part II.D.1 of this preamble, the IFR was a rule of agency management or personnel, as well as a rule of agency organization, procedure, or practice, and was exempt from the requirements for notice-and-comment rulemaking and a 30-day delay in effective date. *See* 5 U.S.C. 553(a)(2), (b)(A); *see also* 84 FR at 44540. This rule adopts the provisions of the IFR with changes to provide restrictions on the authority of the Director regarding further delegations of certain regulatory authorities, to clarify that the Director shall exercise independent judgment when considering cases subject to his adjudication and may take any action within his authority that is appropriate and necessary to decide those cases, and to clarify the authority to interpret certain regulations. These changes are additional matters of agency management or personnel. Accordingly, this final rule, too, is exempt from the requirements of a 30-day delay in effective date.

##### *B. Regulatory Flexibility Act*

Under the Regulatory Flexibility Act (“RFA”), “[w]henever an agency is required by section 553 of [title 5, U.S. Code], or any other law, to publish general notice of proposed rulemaking for any proposed rule, . . . the agency shall prepare and make available for public comment an initial regulatory flexibility analysis.” 5 U.S.C. 603(a); *see also id.* 604(a). Such analysis is not required when a rule is exempt from notice-and-comment rulemaking under 5

U.S.C. 553. Because this rule is exempt from notice-and-comment rulemaking under 5 U.S.C. 553, no RFA analysis under 5 U.S.C. 603 or 604 is required.

*C. Unfunded Mandates Reform Act of 1995*

This final rule will not result in the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of \$100 million or more in any one year, and it will not significantly or uniquely affect small governments. Therefore, no actions were deemed necessary under the provisions of the Unfunded Mandates Reform Act of 1995, 2 U.S.C. 1501 *et seq.*

*D. Executive Order 12866, Executive Order 13563, and Executive Order 13771  
(Regulatory Planning and Review)*

This rule is limited to agency organization, management, or personnel matters and is therefore not subject to review by the Office of Management and Budget pursuant to section 3(d)(3) of Executive Order 12866. Further, because this rule is one of internal organization, management, or personnel, it is not subject to the requirements of Executive Orders 13563 or 13771.

*E. Executive Order 13132 (Federalism)*

This final rule will not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. Therefore, in accordance with section 6 of Executive Order 13132, it is determined that this rule does not have sufficient federalism implications to warrant the preparation of a federalism summary impact statement.

*F. Executive Order 12988 (Civil Justice Reform)*

This final rule meets the applicable standards set forth in sections 3(a) and 3(b)(2) of Executive Order 12988.

*G. Paperwork Reduction Act*

The provisions of the Paperwork Reduction Act of 1995, 44 U.S.C. 3501 et seq., and its implementing regulations in 5 CFR part 1320, do not apply to this rule because there are no new or revised recordkeeping or reporting requirements.

*H. Congressional Review Act*

This is not a major rule as defined by 5 U.S.C. 804(2). This action pertains to agency management or personnel and is a rule of agency organization, procedure, or practice that does not substantially affect the rights or obligations of non-agency parties. Accordingly, it is not a “rule” as that term is used in 5 U.S.C. 804(3). Therefore, the reports to Congress and the Government Accountability Office specified by 5 U.S.C. 801 are not required.

**List of Subjects**

*8 CFR Part 1001*

Administrative practice and procedure, Immigration.

*8 CFR Part 1003*

Administrative practice and procedure, Aliens, Immigration, Legal services, Organization and functions (Government agencies).

*8 CFR Part 1292*

Administrative practice and procedure, Immigration, Lawyers, Reporting and recordkeeping requirements.

*28 CFR Part 0*



Authority delegations (Government agencies), Government employees, Organization and functions (Government agencies), Privacy, Reporting and recordkeeping requirements, Whistleblowing.

Accordingly, for the reasons set forth in the preamble, the interim final rule amending parts 1001, 1003, and 1292 of title 8 of the Code of Federal Regulations and part 0 of title 28 of the Code of Federal Regulations, published August 26, 2019, at 84 FR 44537, is adopted as final with the following changes:

## **Title 8—Aliens and Nationality**

### **PART 1003—EXECUTIVE OFFICE FOR IMMIGRATION REVIEW**

1. The authority citation for part 1003 continues to read as follows:

**Authority:** 5 U.S.C. 301; 6 U.S.C. 521; 8 U.S.C. 1101, 1103, 1154, 1155, 1158, 1182, 1226, 1229, 1229a, 1229b, 1229c, 1231, 1254a, 1255, 1324d, 1330, 1361, 1362; 28 U.S.C. 509, 510, 1746; sec. 2 Reorg. Plan No. 2 of 1950; 3 CFR, 1949-1953 Comp., p. 1002; section 203 of Pub. L. 105-100, 111 Stat. 2196-200; sections 1506 and 1510 of Pub. L. 106-386, 114 Stat. 1527-29, 1531-32; section 1505 of Pub. L. 106-554, 114 Stat. 2763A-326 to -328.

2. Section 1003.0 is amended by revising paragraphs (b)(2) and (c) to read as follows:

#### **§ 1003.0 Executive Office for Immigration Review.**

\* \* \* \* \*

(b) \* \* \*

(1) \* \* \*

(2) *Delegations.* (i) Except as provided in paragraph (b)(2)(ii) of this section, the Director may delegate the authority given to him by this part or otherwise by the Attorney General to the Deputy Director, the Chairman of the Board of Immigration Appeals, the Chief Immigration Judge, the Chief Administrative Hearing Officer, the Assistant Director for Policy, the General Counsel, or any other EOIR employee.

(ii) The Director may not delegate the authority assigned to the Director in §§ 1003.1(e)(8)(ii) and 1292.18 and may not delegate any other authority to adjudicate cases arising under the Act or regulations unless expressly authorized to do so.

(c) *Limit on the authority of the Director.* Except as provided by statute, regulation, or delegation of authority from the Attorney General, or when acting as a designee of the Attorney General, the Director shall have no authority to adjudicate cases arising under the Act or regulations or to direct the result of an adjudication assigned to the Board, an immigration judge, the Chief Administrative Hearing Officer, or an Administrative Law Judge. When acting under authority described in this paragraph (c), the Director shall exercise independent judgment and discretion in considering and determining the cases and may take any action consistent with the Director's authority as is appropriate and necessary for the disposition of the case. Nothing in this part, however, shall be construed to limit the authority of the Director under paragraph (a) or (b) of this section.

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## **PART 1292—REPRESENTATION AND APPEARANCES**

3. The authority citation for part 1292 continues to read as follows:

**Authority:** 8 U.S.C. 1103, 1362.

4. Section 1292.6 is amended by revising the last sentence to read as follows:

### **§ 1292.6 Interpretation.**

\* \* \* Interpretations of §§ 1292.11 through 1292.20 will be made by the Assistant Director for Policy (or the Assistant Director for Policy's delegate) or the Director.

**§ 1292.18 [Amended]**

5. Section 1292.18 is amended in paragraph (a) introductory text by removing the last sentence.

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Date October 13, 2020.

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William P. Barr  
Attorney General

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